

JUDICIARY RISING: CONSTITUTIONAL CHANGE IN THE UNITED KINGDOM

Erin F. Delaney

ABSTRACT—Britain is experiencing a period of dramatic change that challenges centuries-old understandings of British constitutionalism. In the past fifteen years, the British Parliament enacted a quasi-constitutional bill of rights; devolved legislative power to Scotland, Wales, and Northern Ireland; and created a new Supreme Court. British academics debate how each element of this transformation can be best understood: is it consistent with political constitutionalism and historic notions of parliamentary sovereignty, or does it usher in a new regime that places external, rule-of-law-based limits on Parliament? Much of this commentary examines these changes in a piecemeal fashion, failing to account for the systemic factors at play in the British system.

This Article assesses the cumulative force of the many recent constitutional changes, shedding new light on the changing nature of the British constitution. Drawing on the U.S. literature on federalism and judicial power, the Article illuminates the role of human rights and devolution in the growing influence of the U.K. Supreme Court. Whether a rising judiciary will truly challenge British notions of parliamentary sovereignty is as yet unknown, but scholars and politicians should pay close attention to the groundwork being laid.

AUTHOR—Assistant Professor, Northwestern University School of Law. For helpful conversations during a transatlantic visit at a very early stage of this project, I am grateful to Trevor Allan, Lord Hope, Charlie Jeffery, Lord Collins, and Stephen Tierney. For their suggestions and criticisms, I would like to thank Vernon Bogdanor, Barry Friedman, Tom Ginsburg, Ran Hirschl, Sam Issacharoff, Tonja Jacobi, Kurt Lash, Travis Lenkner, Henry Monaghan, Jim Pfander, Tanusri Prasanna, and participants at the International Perspectives on Public Law Conference at Notre Dame London Law Centre; the Illinois Program on Constitutional Theory, History, and Law; the Madrid meeting of Research Committee 09 of the International Political Science Association; the European Legal Studies Center at Columbia Law School; and the Junior Faculty Workshop at Columbia Law School. Abigail Bunce, Alexandra Caritis, Tracy Ke, and Heidi Kuehl provided excellent research assistance, and the Article benefited from the assiduous attention to detail of Kathryn Shephard and her colleagues at the *Northwestern University Law Review*.

NORTHWESTERN UNIVERSITY LAW REVIEW

INTRODUCTION544

I. THE BRITISH CONSTITUTION: CONTESTED CONSTITUTIONALISM.....548

A. *Political Constitutionalism and Parliamentary Sovereignty*..... 550

B. *Legal Constitutionalism and Judicial Review*..... 553

II. CONSTITUTIONAL CHANGE IN THE UNITED KINGDOM.....555

A. *The Human Rights Act (1998)*..... 556

B. *The Devolution Acts (1998 et seq.)*..... 561

C. *The Constitutional Reform Act (2005)*..... 569

III. MULTILEVEL GOVERNANCE AND LEGAL CONSTITUTIONALISM:

REFORM IN CONTEXT573

A. *Boundary Disputes*..... 575

B. *Pressures for Uniformity* 594

CONCLUSION 604

INTRODUCTION

For those interested in studying constitutional design and constitutionalism, the twenty-first century has presented ample opportunity—from constitution building in Iraq and Afghanistan to the Arab Spring and related change in Egypt, Libya, Tunisia, and other states. These new constitutional processes and regimes demand attention; they present the possibility of far-reaching democratic expansion in the midst of often violent power struggles. But dramatic constitutional change can also occur in a more orderly fashion and within established democracies. In this set, no country has seen more striking shifts in its constitutional design than the United Kingdom.

Staid, comfortable old Britain—with its own Glorious Revolution well in the past and a history of rights protection “from time immemorial”¹—is having a constitutional renaissance.² In the past fifteen years, the British Parliament enacted a quasi-constitutional bill of rights; devolved legislative power to Scotland, Wales, and Northern Ireland; and created a new Supreme Court. As Anthony King, a professor of British government, has remarked, “Although few people seem to have noticed the fact, the truth is that the United Kingdom’s constitution changed more between 1970 and 2000, and especially between 1997 and 2000, than during any comparable

¹ 1297—or even 1215—is not quite “from time immemorial,” but it is close. See MAGNA CARTA (1297). On the Glorious Revolution, see EDWARD VALLANCE, THE GLORIOUS REVOLUTION 1688: BRITAIN’S FIGHT FOR LIBERTY (2006).

² ROGER MASTERMAN, THE SEPARATION OF POWERS IN THE CONTEMPORARY CONSTITUTION 245 (2011) (“The effects of the constitutional reforms that have been implemented since the first Blair administration came to power in May 1997 are nothing short of spectacular, given the generally incremental development of the UK constitution.”).

period since at least the middle of the 18th century.”³ Subsequent authors identify the critical years as those from 1997 to 2005: the heart of the Blair government’s efforts to “modernize” the country and the constitution.⁴

American attention has not been focused on these events; indeed, many are unaware of the extent or nature of recent constitutional change in the United Kingdom.⁵ But scholars in Britain have debated the meaning of these reforms and their effects on the way British constitutionalism is conceptualized and articulated.⁶ Two competing normative and descriptive theories structure these constitutional debates: political constitutionalism and legal constitutionalism. Political constitutionalism finds its support in representative democracy and republicanism and gives rise to institutional fidelity to Parliament and the doctrine of parliamentary sovereignty. Legal constitutionalism, in contrast, identifies the primacy of rights protection and the dangers of excessive democracy; legal constitutionalists maintain that external limitations must exist on Parliament, and, generally speaking, they focus their attention on the role of courts and judicial review. In the literature, most reforms are assessed by their perceived connections to either a broader political or legal constitutionalist framework.

This scholarly agenda has developed in an ad hoc fashion, due in large part to the fact that the various reforms themselves “have been legislated piecemeal, and . . . seem without internal coherence. They have been regarded, therefore, as a disparate collection of unrelated measures rather than as a package.”⁷ Some initial efforts have been made to view these changes in light of their combined effect on the constitutional system.⁸ But, as Richard Bellamy, a leading political constitutionalist, wrote in 2011, “no

³ ANTHONY KING, DOES THE UNITED KINGDOM STILL HAVE A CONSTITUTION? 53 (2001).

⁴ Tony Blair led the Labour Party to victory in 1997, 2001, and 2005, and served as Prime Minister from 1997 until June 2007. Authors recognizing constitutional change include Nicholas Bamforth, *Current Issues in United Kingdom Constitutionalism: An Introduction*, 9 INT’L J. CONST. L. 79, 79 (2011), who describes 1997 to 2005 as a period of “sustained and deep-level constitutional change,” and Robert Hazell, *Reinventing the Constitution: Can the State Survive?*, 1999 P.L. 84, 85, who claims the eleven constitutional bills proposed in the opening session of Parliament in 1997 “to be a parliamentary record. For once it wasn’t hyperbole when the Scottish White Paper described these as ‘the most ambitious and far reaching changes in the British constitution undertaken by any government this century.’”

⁵ Attention in U.S. law reviews has been limited. See, e.g., Peter L. Fitzgerald, *Constitutional Crisis over the Proposed Supreme Court for the United Kingdom*, 18 TEMP. INT’L & COMP. L.J. 233 (2004); JoAnne Sweeny, *Creating a More Dangerous Branch: How the United Kingdom’s Human Rights Act Has Empowered the Judiciary and Changed the Way the British Government Creates Law*, 21 MICH. ST. INT’L L. REV. 301 (2013); JoAnne Sweeny, *The United Kingdom’s Human Rights Act: Using Its Past to Predict Its Future*, 12 LOY. J. PUB. INT. L. 39 (2010).

⁶ The *International Journal of Constitutional Law* featured a series of articles by key British authors in this debate in a 2011 Symposium. See Symposium, *The Changing Landscape of British Constitutionalism*, 9 INT’L J. CONST. L. 79–273 (2011).

⁷ VERNON BOGDANOR, THE NEW BRITISH CONSTITUTION 271 (2009).

⁸ See, e.g., *id.*

scholar has adequately assessed all [the significant changes] and the interesting and complex ways they interrelate.”⁹

Beyond introducing the changing British constitutional system to an American audience, this Article seeks to fill the gap in the existing British literature by presenting the current round of constitutional reforms as interconnected elements within a system of multilevel governance.¹⁰ In so doing, it will provide a richer descriptive analysis of the British constitutional system and will highlight the potential for further change. In his recent book, *The New British Constitution*, Vernon Bogdanor claims that Britain is “in transition from a system based on parliamentary sovereignty to one based on the sovereignty of a constitution.”¹¹ In other words, he suggests that Britain is changing from a system of pure parliamentary power to one in which there are external limits to parliamentary action—meaningful, *legal* limits, as would exist in a constitution interpreted and upheld by a court. By considering the ways in which newly created institutional relationships have affected the role of the judiciary, this Article provides evidence to support Bogdanor’s assertion. In addition, evidence of relationships and networks that support judicial power—and in particular, the power of the U.K. Supreme Court—will affect the debate between the political and legal constitutionalists. To the extent that the judiciary’s fortunes may be rising, the legal constitutionalists gain fodder for their arguments about the nature of British constitutional reform—that it is shifting to a system marked by external limitations on Parliament capable of being enforced by the judiciary. (And political constitutionalists would do well to take note.)

In order to investigate these relationships in the United Kingdom, this Article will draw on the rich literature developed to explain the rise and maintenance of judicial power in the United States. American legal academics and political scientists have long attempted to understand how and in what ways the U.S. Supreme Court grew in power and authority over the centuries since its birth. They have identified explanatory factors—varying in persuasiveness—to explain the rise of judicial review and the phenomenon of judicial supremacy, including the role of multilevel governance structures.¹² In the United States, “th[e] transformation of the

⁹ See Richard Bellamy, *Political Constitutionalism and the Human Rights Act*, 9 INT’L J. CONST. L. 86, 87 n.5 (2011).

¹⁰ An earlier effort described the results of constitutional change as creating a multilayered constitutional system. See generally PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION (Nicholas Bamforth & Peter Leyland eds., 2003).

¹¹ BOGDANOR, *supra* note 7, at xiii.

¹² See, e.g., KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007); Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1166–72 (2011); Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 VAND. L. REV. 73, 114 (2000); Mark A. Graber, *The*

institutional judiciary did not occur without controversy, without contestation, or without compromise,¹³ and merely because circumstances may suggest the rise of judicial power does not mean that the judiciary in Britain will develop in the same way as its American counterpart. Nevertheless, by drawing on this scholarship, this Article argues that similar conditions for increased judicial power do exist in Britain such that, over time,¹⁴ the U.K. Supreme Court could gain sufficient institutional strength to enforce some limits on Parliament.

This Article proceeds in three parts. Part I provides a brief description of the broader constitutional debate in Britain, outlining the opposing viewpoints of the political and legal constitutionalists and their respective institutional connections with Parliament and the judiciary. Part II describes three dramatic reforms to Britain's political and legal structure: the Human Rights Act (1998), which provided a catalogue of judicially enforceable rights; the Devolutionary Acts (1998 *et seq.*), which created and empowered subnational legislatures in Scotland, Northern Ireland, and Wales; and the Constitutional Reform Act (2005), which removed the United Kingdom's highest court from the House of Lords and created a new United Kingdom Supreme Court.¹⁵ Part III then presents a series of expectations, drawn from political science literature on federalism and comparative scholarship on courts, about how the interactions between and among the Human Rights Act, devolution, and the new Supreme Court could serve to empower the British judiciary. In certain cases, the expected behavior is observable; in others, differences in political structures and the cultural context suggest other results. Nevertheless, at a general level, Part

Nonmajoritarian Difficulty: Legislative Deference to the Judiciary, 7 *STUD. AM. POL. DEV.* 35 (1993) [hereinafter Graber, *The Nonmajoritarian Difficulty*]; J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 *J. LEGAL STUD.* 721 (1994); James R. Rogers, *Information and Judicial Review: A Signaling Game of Legislative–Judicial Interaction*, 45 *AM. J. POL. SCI.* 84 (2001); Matthew C. Stephenson, “When the Devil Turns . . .”: *The Political Foundations of Independent Judicial Review*, 32 *J. LEGAL STUD.* 59 (2003).

¹³ JUSTIN CROWE, *BUILDING THE JUDICIARY* 14 (2012).

¹⁴ *See id.* at 7 (“[A]ny view of the judiciary as simply a constitutional abstraction that does not itself develop over time is misguided.”); *see also* Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 *AM. POL. SCI. REV.* 511, 511 n.1 (2002) (noting the “questionable assumption[] . . . that the nature and scope of judicial power are a preconstitutional decision rather than a by-product of ongoing political construction”).

¹⁵ This Article does not address the relationship between Britain and the European Union. The role of the European Communities Act (1972) in raising the profile and power of the judiciary is an oft-discussed challenge to parliamentary sovereignty. *See, e.g.*, ELIZABETH WICKS, *THE EVOLUTION OF A CONSTITUTION: EIGHT KEY MOMENTS IN BRITISH CONSTITUTIONAL HISTORY 137–65* (2006); N.W. Barber, *The Afterlife of Parliamentary Sovereignty*, 9 *INT’L J. CONST. L.* 144, 149–51 (2011); Adam Tucker, *Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty*, 31 *O.J.L.S.* 61, 72–77 (2011). To the extent that the multilevel dynamic between the U.K. and the EU presents opportunities for enhanced judicial power, these possibilities will be noted. *See infra* notes 182 and 309.

III concludes that these interactions demonstrate an increased, and increasing, power of the judiciary, thus lending support to those who claim a constitutional shift is occurring.

I. THE BRITISH CONSTITUTION: CONTESTED CONSTITUTIONALISM

Partially written in various Acts and statutes,¹⁶ partially constructed out of conventions, practices, and understandings—the British constitution defies easy identification.¹⁷ It is therefore unsurprising that British *constitutionalism*, or the “normative creed” of the constitution,¹⁸ is likewise difficult to define. Two competing theories vie to provide the overarching conception of constitutionalism: “political constitutionalism” and “legal constitutionalism.” These theories proceed along terms both normative—how *should* the constitutional system be understood—and descriptive—how *can* the constitutional system be understood.¹⁹

In very broad terms, theories of political and legal constitutionalism are often thought to match the British and American systems of government: a supreme parliament in Britain and a supreme court in America.²⁰ Of course, this distinction blurs in the details. As Richard Bellamy, the leading political constitutionalist in Britain, acknowledges, “[t]here has always been a legal constitutionalist strand within British constitutional culture, and historians have long stressed the republican and political thread running through the American . . . constitutional tradition.”²¹ Nevertheless, the analogy reflects a core difference between the approaches: the institution or institutions entrusted with the responsibility for ensuring both accountability and governmental (and possibly societal) fidelity to the constitutional order.²²

¹⁶ See John Gardner, *Can There Be a Written Constitution?* 3 (Oxford Legal Studies, Research Paper No. 17/2009, 2009), available at <http://ssrn.com/abstract=1401244> (citing “Magna Carta 1297, the Laws in Wales Acts 1535–1542, the Habeas Corpus Act 1679, the Bill of Rights 1689, the Act of Union (with Scotland) 1707, the Act of Union (with Ireland) 1800, the Judicature Acts 1873 and 1875, and the Statute of Westminster 1931” as canonical texts, among other “[m]ore debatable” examples listed afterwards).

¹⁷ JAMES MITCHELL, *DEVOLUTION IN THE UK* 1 (2009) (describing the nation’s “constitutional illiteracy” as stemming from the fact “that there is no agreement on what constitutes the UK constitution”).

¹⁸ Walter F. Murphy, *Designing a Constitution: Of Architects and Builders*, 87 TEX. L. REV. 1303, 1309 (2009).

¹⁹ See Adam Tomkins, *What’s Left of the Political Constitution?*, 14 GERMAN L.J. 2275, 2275 (2013) (describing the relationship between political and legal constitutionalism as “one of rivalry”).

²⁰ See RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM* 10 (2007); see also *id.* (“[P]arliamentary sovereignty and the Westminster model . . . has frequently provided the model for political constitutionalists.”).

²¹ *Id.* (citing to popular constitutionalist writing in the United States).

²² See Paul P. Craig, *Political Constitutionalism and Judicial Review*, in *EFFECTIVE JUDICIAL REVIEW* 19, 32 (Christopher Forsyth et al. eds., 2010) (noting political constitutionalists emphasize “non-judicial mechanisms for securing accountability”).

The normative debate will be familiar to an American audience: Legal constitutionalists maintain that constitutional goods are best guaranteed through the articulation of rights-protecting fundamental law, a law that stands superior to and apart from daily political machinations and to which all governmental institutions are bound, primarily through the mechanism of judicial review. In contrast, political constitutionalists argue that resting ultimate authority in a democratic parliament better achieves the “constitutional goods of rights and the rule of law,”²³ by protecting values of democracy and republican nondomination. Given the dramatic influence of theories of fundamental rights and the rise of court-centered constitutional systems over the past fifty years, in a global context the political constitutionalists are outnumbered. In the United Kingdom, however, they have a more persuasive case, resting on the descriptive prong of their analysis.

Constitutionalism in the absence of a codified constitution derives in large part from the practices of the political system.²⁴ Thus, describing those practices is particularly important: demonstrating, for example, that the British system has always had elements that promote or reflect a particular set of constitutionalist aims makes it easier to advocate for further reform in that vein. The political constitutionalists are better situated in this context because, in the British political system, sovereignty has been long understood to rest in Parliament²⁵—a functional application of the normative principles of political constitutionalism. In contrast, the legal constitutionalist model relies on “the assumption that courts are important for legal accountability,”²⁶ and legal constitutionalists struggle to provide conclusive evidence that meaningful judicial review is and has been an essential element of British constitutionalism.²⁷

This Part will provide a brief overview of each theory of constitutionalism and how it connects to various aspects of British political culture and organization. The theories are necessarily presented in broad terms; these are contested concepts themselves, with many nuances and distinctions in their normative justifications. In order to provide some practical purchase on these ideas, this Part will also discuss the institutions with which each theory is most closely connected: political constitutionalism with Parliament, legal constitutionalism with the judiciary. As with the theories themselves, these institutional linkages are

²³ BELLAMY, *supra* note 20, at 12.

²⁴ *Id.*

²⁵ A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 37–41 (7th ed. 1908).

²⁶ Craig, *supra* note 22, at 58.

²⁷ In the British context, “judicial review,” akin to administrative review in the United States, is limited to review of executive action and secondary legislation. For a discussion of judicial review, see PAUL CRAIG, ADMINISTRATIVE LAW 4–7 (6th ed. 2008), and Paul Craig, *Ultra Vires and the Foundations of Judicial Review*, 57 CAMBRIDGE L.J. 63, 64–66 (1998).

of primary importance at a general level; this focus is not intended to deny the potential relevance of courts to political constitutionalists, or of Parliament to legal constitutionalists.²⁸

A. Political Constitutionalism and Parliamentary Sovereignty

To understand political constitutionalism as a working theory of constitutional order, it is first necessary to explain and discuss the doctrine of parliamentary sovereignty and its development as the “dominant characteristic” of the British political system.²⁹ The evolution of Parliament as a representative forum presents a complicated and detailed history, but a few aspects of its progression serve to highlight its critical constitutional role. Parliamentary power accrued slowly, over time, by a corresponding decline or diminution of the power of the throne.³⁰ Parliamentary authority thus derived from the institution’s ancient connection to the monarchy, rather than due to the actions of a constituent power resting in “the people.”³¹ In the United States, popular sovereignty provides a theoretical justification for setting limits on legislative action; the people act as the principal, the legislature as their agent. But parliamentary sovereignty has been described as an “obfuscation,” something like a sleight of hand, allowing Parliament’s representative function to stand in for popular sovereignty.³² Thus, there is no clear basis for external limitations on parliamentary power.³³

The modern conception of parliamentary sovereignty was articulated in 1885, when Albert Venn Dicey, a Professor at All Souls College,

²⁸ See, e.g., Gardner, *supra* note 16, at 7 (“My emphasis on the courts does not prevent me from endorsing Bellamy’s [a political constitutionalist’s] view of the constitution.”).

²⁹ DICEY, *supra* note 25, at 37.

³⁰ See, e.g., J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* (1957); CONRAD RUSSELL, *KING JAMES VI AND I AND HIS ENGLISH PARLIAMENTS* (Richard Cust & Andrew Thrush eds., 2011). Thus (and notwithstanding the modern focus on the popularly elected House of Commons), the legislative power does not reside in the House of Commons alone, but in the Queen, the House of Lords, and the Commons. Together they act as “the crown-in-parliament.” See Martin Loughlin, *Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice*, in *THE PARADOX OF CONSTITUTIONALISM* 27, 43 (Martin Loughlin & Neil Walker eds., 2007).

³¹ The idea of popular sovereignty was “suppress[ed]” after the failure of the Commonwealth of England (1649 to 1660), and after the restoration of the monarchy, parliamentary authority was justified through the reinvocation of the divine right of the king. Loughlin, *supra* note 30, at 28. Jeffrey Goldsworthy describes parliamentary sovereignty as a doctrine developed in the late seventeenth century. See JEFFREY GOLDSWORTHY, *PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES* 18–47 (2010).

³² Loughlin, *supra* note 30, at 28, 42.

³³ Certain legal constitutionalists suggest judicial power can be grounded on a separate understanding of sovereignty. See T.R.S. ALLAN, *CONSTITUTIONAL JUSTICE* 13–21 (2001) (discussing various interpretations of Dicey and promoting the understanding of the British constitution as providing dual sovereignty—of Parliament and of the courts).

Oxford, wrote an *Introduction to the Study of the Law of the Constitution*. The Diceyan explanation has held sway for over 100 years, and his exegesis has “almost served as a surrogate written constitution,” making sense of the myriad conventions and other unarticulated norms that structure the British system of government.³⁴ Dicey’s definition of Parliament’s power is succinct: “[T]he right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.”³⁵

This definition of parliamentary sovereignty encompasses three important ideas. First, there is no entrenchment of fundamental or “constitutional” laws. In other words, to the extent that there may be some distinction between fundamental and ordinary law (a contention Dicey denies³⁶), fundamental law does not achieve its importance by means of its creation or implementation but by political convention.³⁷ Second, Parliament is supreme. No other institution “can pronounce void any enactment passed by the British Parliament on the ground of such enactment being opposed to the constitution.”³⁸ And third, and perhaps more obliquely, even Parliament cannot bind itself. No Parliament can bind successor Parliaments.³⁹

Under this definition of parliamentary power, therefore, the unwritten constitution does not provide any sort of *legal* limitations on Parliament. The constitution “lives on, changing from day to day for the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also.”⁴⁰ Dicey did not deny that there were *practical* limitations on the

³⁴ THE CHANGING CONSTITUTION v (Jeffrey Jowell & Dawn Oliver eds., 6th ed. 2007).

³⁵ DICEY, *supra* note 25, at 38.

³⁶ Dicey claims that “[t]here is under the English constitution no marked or clear distinction between laws which are not fundamental or constitutional and laws which are fundamental or constitutional.” *Id.* at 85. This statement is under some pressure from the courts and politicians, as doctrines and conventions emerge requiring clear statement rules from Parliament about the alteration of certain statutes. *See infra* Part II.A.

³⁷ In other words, there are no voting requirements (supermajoritarian or otherwise) to designate “constitutional” legislation. “[F]undamental . . . laws are . . . changed by the same body and in the same manner as other laws, namely, by Parliament acting in its ordinary legislative character.” DICEY, *supra* note 25, at 84. *But see* SELECT COMMITTEE ON THE CONSTITUTION, THE PROCESS OF CONSTITUTIONAL CHANGE, 2010–12, H.L. 177 (U.K.) (suggesting the creation of procedural mechanisms to indicate the constitutional importance of proposed legislation).

³⁸ DICEY, *supra* note 25, at 87.

³⁹ *Id.* at 84.

⁴⁰ J.A.G. Griffith, *The Political Constitution*, 42 M.L.R. 1, 19 (1979).

power of Parliament: certainly political limitations exist.⁴¹ As Lord Reid opined in 1969:

It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid.⁴²

This conventional account of the British constitution makes little provision for a meaningful judicial role.⁴³

After a century of change and constitutional experience, scholars debate whether the three elements of Dicey's definition of parliamentary sovereignty are still valid.⁴⁴ This descriptive analysis will be discussed in Part II. In tandem, scholars also ask whether they *should* hold true. Political constitutionalists, who defend robust parliamentary sovereignty, respond by drawing on theories of democracy, republicanism, and pragmatism.⁴⁵

In his detailed explication of political constitutionalism, Richard Bellamy offers a comprehensive justification for preferring parliamentary sovereignty to constitutional supremacy through judicial review.⁴⁶ He makes two claims, one empirical and one normative: he argues first that there is reasonable disagreement about substantive outcomes that society should achieve, and then concludes "the democratic process is more

⁴¹ Dicey discussed these in terms of external limitations, such as the threat of revolution, and internal limitations, arising from the nature of the sovereign power itself as the "product of a certain social condition." DICEY, *supra* note 25, at 79.

⁴² *Madzimbamuto v. Lardner-Burke*, [1969] 1 A.C. 645, 723 (P.C.) (appeal taken from S. Rhodesia).

⁴³ Courts necessarily have some role to play: "As the doctrine is applied today, the courts determine the legal effect of Acts of Parliament but Parliament may always relegate to overrule the courts, subject again to the courts' determining the legal effects of the re legislation. Parliament can always get its way in the end by progressively more definite reiteration. Unless Parliament tires of the process, the courts only get to postpone their own defeat." Gardner, *supra* note 16, at 8.

⁴⁴ See, e.g., ALISON L. YOUNG, PARLIAMENTARY SOVEREIGNTY AND THE HUMAN RIGHTS ACT 68–72 (2009) (justifying Parliament's actions creating "manner and form requirements" which mark validly enacted legislation and serve to bind successive Parliaments, as still within a conception of the Diceyan constitution, under the theory of "continuing parliamentary legislative supremacy").

⁴⁵ See BELLAMY, *supra* note 20 (democracy); ADAM TOMKINS, OUR REPUBLICAN CONSTITUTION (2005) (republicanism); Craig, *supra* note 22, at 27–32 (discussing pragmatic political constitutionalists who focus on questions of institutional competence and who argue that a legislature is better suited to address the "circumstances of politics" given its ability (relative to courts and judicial review) to provide comprehensive analysis of a given issue, to accommodate polycentric disputes, and to allow for debate on fundamental values).

⁴⁶ See BELLAMY, *supra* note 20. His insights build on work by J.A.G. Griffith, whose assessment of society led to his conclusion that law can only be a means of postponing, or "temporarily resolv[ing]" societal conflict, and as such, is itself political, Griffith, *supra* note 40, at 16, 20, and Jeremy Waldron's critique of strong-form judicial review, see Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

legitimate and effective than the judicial process at resolving these disagreements.”⁴⁷ In his view, the constitution should not be a repository of substantive societal commitments but a “*structure* for reaching collective decisions about social arrangements in a democratic way.”⁴⁸ Bellamy argues that political institutions—including party membership, equal voting power, and majority rule—can better reflect core republican values, such as nondomination and political equality, thus avoiding the potential oppression/domination of the constitution (as outside of politics) and the antimajoritarian nature of the courts.⁴⁹

B. Legal Constitutionalism and Judicial Review

In contrast to political constitutionalists, who accept only political limitations on Parliament, legal constitutionalists seek to identify judicially enforceable, external substantive limits on Parliament, grounded in the common law or in principles inherent in the rule of law. Their underlying normative arguments reflect concerns about the excesses of democracy, thus seeking to protect human rights through constitutional entrenchment and to prevent a tyranny of the majority through countermajoritarian courts. Those theorists who consider themselves “moderate” legal constitutionalists would forswear any exclusivity arguments: the common law may be the “primary repository of fundamental values of the political community,” but it is not the only place to look.⁵⁰ They acknowledge that there are ways to promote accountability, “independently of judicial review,”⁵¹ but maintain that courts may be essential for *legal* accountability.

The challenge for British legal constitutionalists is not in providing a counterargument to the normative position taken by the political constitutionalists—in much of the constitutional world, the safeguarding of fundamental rights is seen as in tension with representative democracy but is nevertheless considered a defensible good.⁵² Rather, it is in offering convincing evidence that the common law, or principles inherent in the rule of law, actually exerts any limiting effect on Parliament through the courts. The challenge has been to demonstrate that legal constitutionalism plays a role in lived British constitutional experience, and thus to gain support for

⁴⁷ BELLAMY, *supra* note 20, at 4.

⁴⁸ *Id.* (emphasis added).

⁴⁹ *See id.* at 147–75.

⁵⁰ Craig, *supra* note 22, at 56.

⁵¹ *Id.* at 58.

⁵² *See* Murphy, *supra* note 18, at 1309–10 (describing the tension between substantive constitutional limitations and representative democracy, “whose underlying norm of popular sovereignty is hostile to substantive limitations on the people’s freely chosen representatives”).

the argument that it should continue to do so in a more robust fashion.⁵³ The legal constitutionalists' attention has therefore focused on the expansion of administrative judicial review in Britain, the justifications for such review, and the manner in which the courts conduct the review.

Robert Stevens has described mid-twentieth-century Britain as marking “the depths of the irrelevance of the courts in the development of the constitution,”⁵⁴ but the rise of judicial review of executive action in the latter half of the century introduced public law into the mainstream.⁵⁵ By 1988, the British Civil Service was warning officials to bear in mind the possibility of judicial review when preparing secondary legislation;⁵⁶ the pamphlet was entitled *The Judge over Your Shoulder*.⁵⁷ Courts inquired whether action by government officials, or the content of secondary legislation, was *ultra vires*—or “beyond power.” As Paul Craig has explained, the phrase “does not, in and of itself, tell us whether an act is beyond power because the legislature has intended to place certain limits on an agency, or whether these limits are more properly regarded as a common law creation of the courts.”⁵⁸

As there is uncertainty in the justification for *ultra vires* judicial review of secondary legislative and executive action, its existence alone fails to conclusively demonstrate the functional application of “legal constitutionalism.” For example, some argue, in political constitutionalist terms, that the only justification for the *ultra vires* doctrine is parliamentary intent: Parliament provides a set of boundaries beyond which its agents may not venture, and in maintaining these limits courts are effectuating the purposes and intent of Parliament.⁵⁹ If this connection is relinquished, “it

⁵³ T.R.S. Allan takes this argument the furthest, by arguing that the British constitution (in part due to its insistence on an independent judiciary) provides for the dual sovereignty of Parliament and the courts. See ALLAN, *supra* note 33, at 13.

⁵⁴ Robert Stevens, *Government and the Judiciary*, in THE BRITISH CONSTITUTION IN THE TWENTIETH CENTURY 333, 346 (Vernon Bogdanor ed., 2003). The influence of the doctrine of parliamentary sovereignty “implied that there should be no serious questioning not only of Acts of Parliament, but of administrative decisions.” This meant that “judicial work focused overwhelmingly on private law: public law by contrast was moribund, a wasteland.” Danny Nicol, *Law and Politics After the Human Rights Act*, 2006 P.L. 722, 724.

⁵⁵ See Nicol, *supra* note 54, at 724 (“In the last 50 years, . . . judges [in Britain] belatedly roused themselves from their post-Second World War stupor and sought to impose order on a burgeoning regulatory state . . .”).

⁵⁶ Secondary legislation is roughly equivalent to administrative regulations (or general executive rulemaking) in the United States; secondary legislation must be expressly authorized by primary legislation. Thus, primary legislation would be equivalent to congressional or legislative statutes. Cf. P.P. CRAIG, PUBLIC LAW AND DEMOCRACY IN THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA 10–11 (1990) (discussing differences between public law in the United States and U.K.).

⁵⁷ TREASURY SOLICITOR’S DEP’T & CABINET OFFICE MGMT. & PERS. OFFICE, THE JUDGE OVER YOUR SHOULDER (1987).

⁵⁸ Paul Craig, *Competing Models of Judicial Review*, 1999 P.L. 428, 428.

⁵⁹ Craig identifies two possible versions of the *ultra vires* mode: specific versus general legislative intent. Specific intent suggests that Parliament has provided substantive rules of judicial review—this is

sweeps away the constitutional theory of sovereignty on which the ultra vires doctrine is based.”⁶⁰ In contrast, other scholars have argued that case law demonstrates courts do not rely on parliamentary intent as the touchstone for judicial review, and that courts “will continue to apply their judicially developed tools even where there is an express or unequivocal Parliamentary intention to the contrary.”⁶¹ Therefore, it must be the common law that provides the substantive justification for judicial review.⁶²

Some legal constitutionalists, such as Trevor Allan, take the relationship between parliamentary sovereignty and the common law a step further, seeking to demonstrate how the two concepts are intertwined. Allan explains:

[T]he scope and effect of the doctrine [of parliamentary sovereignty] depend on persuasive analysis of the common law, sensitive to its constitutional role in reflecting and preserving the rule of law. If there are inherent limits to what can properly count as ‘law’, according to a proper understanding of the rule of law, there are limits to legislative supremacy that can be enforced at common law.⁶³

In other words, if parliamentary sovereignty is, in fact, a common law doctrine, it is the common law that may regulate and limit its breadth.

* * *

The debate between political and legal constitutionalists is about representative democracy, individual rights, and the rule of law—and about the best mechanisms to achieve these often conflicting conceptions of the good. At another level of analysis, the debate is about how best to describe institutions: how they function, to what ends, and whether it is possible to understand (or persuasively describe) their place in the constitutional scheme as promoting or hindering one’s normative preferences. The following Part will present analyses of three new constitutional reforms in light of these descriptive aims.

II. CONSTITUTIONAL CHANGE IN THE UNITED KINGDOM

In the British constitutional debate, much of the focus is on theoretical and normative justifications for why one version of constitutionalism is

not commensurate with reality. *Id.* at 430. General legislative intent does not require Parliament to provide rules; it serves rather as a “formal legitimation,” while “tell[ing] us nothing as to the specific content thereof.” *Id.* at 431.

⁶⁰ Mark Elliott, *The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law*, 58 CAMBRIDGE L.J. 129, 132 (1999).

⁶¹ See Craig, *supra* note 58, at 438, 443.

⁶² *Id.* at 431 (discussing “supporters of the common law model”).

⁶³ ALLAN, *supra* note 33, at 240.

better or worse at protecting constitutional goods; but, as mentioned above, there is also a descriptive agenda. How does the British constitutional system work? Is it really a legal constitutionalist system hiding under a veneer of parliamentary sovereignty? Is the system transitioning “from a system based on parliamentary sovereignty to one based on the sovereignty of a constitution”?⁶⁴

This Part will review a number of new constitutional reforms in light of their relevance to the debate between political and legal constitutionalists. To understand the broader implications of each reform, it is possible to use an institutional shorthand: will the reform serve to maintain or limit the power of the U.K. Parliament (Westminster) or might it in some way empower the judiciary? Of course, this measure is not perfectly calibrated to the underlying questions of constitutionalism: political or pragmatic limitations on Parliament may not translate to judicially enforced limitations; empowering the courts in a general way may not provide external limits on parliamentary power. Nevertheless, given the general connection between institutional power and constitutional theory, it is possible to gain some insight by observing the changes in institutional design. The descriptive analysis of three reforms in this Part—the Human Rights Act of 1998, the set of devolution acts of 1998 (and the various legislative updates and amendments), and the 2005 Constitutional Reform Act, which created the new U.K. Supreme Court—provides context for the effort, in Part III, to understand how these reforms interact and what that interaction might mean for British constitutionalism.

A. *The Human Rights Act (1998)*

The Human Rights Act (HRA), enacted by Parliament in 1998, originated in international law almost 50 years earlier. In 1949, the United Kingdom, along with nine other European nations,⁶⁵ founded a regional organization called the Council of Europe (CoE). The CoE’s primary goal was to craft a human rights charter with the aim of preventing atrocities of the type seen during the Second World War. The result was the European Convention on Human Rights and Fundamental Freedoms (Convention), which the United Kingdom ratified in 1951 and which entered into force in 1953. Under the terms of the Convention and the subsequent case law of the European Court of Human Rights (ECtHR), after exhausting her domestic remedies, a British citizen could petition the European-level

⁶⁴ BOGDANOR, *supra* note 7, at xiii.

⁶⁵ The original ten countries were Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom. Statute of the Council of Europe, May 5, 1949, 87 U.N.T.S. 103.

institutions claiming that the United Kingdom had breached her Convention rights.⁶⁶

In the U.K. courts, however, a litigant could not rely on a Convention right (such as the Article 8 right to respect for private and family life) to provide protection or a remedy against government action. The United Kingdom is a dualist nation, meaning that for instruments of international law to have legal effect within the country, the treaty or convention must be translated into domestic law, usually through implementing legislation enacted by Parliament.⁶⁷ And the United Kingdom, for over forty-five years, had declined to enact such legislation. Litigants seeking to enforce their Convention rights had little choice other than to proceed at the European level.

In 1997, the Blair government proposed incorporating many of the European Convention rights into domestic law,⁶⁸ thus “giv[ing] people . . . easier access to their Convention rights.”⁶⁹ In a White Paper called *Rights Brought Home*, the government argued that national legislation, through the proposed HRA, would allow people in the United Kingdom to raise rights claims “in British courts rather than having to incur the cost and delay of taking a case to . . . Strasbourg.”⁷⁰ The HRA thus served to update British rights protection,⁷¹ while bringing the United Kingdom into line with its European allies that already included Convention rights within their

⁶⁶ Initially a petition was lodged with the Commission on Human Rights, which, in certain cases, would forward it to the Court for review; now petitions go directly to the Court (or, more accurately, one of its Committees). See Convention for the Protection of Human Rights and Fundamental Freedoms arts. 25, 48, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Convention]; Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby art. 34, *opened for signature* May 11, 1994, 2061 U.N.T.S. 7 (entered into force Nov. 1, 1998) [hereinafter Convention Protocol No. 11].

⁶⁷ See John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 314–15, 319 (1992).

⁶⁸ The Convention was not fully incorporated—critically, Article 13 of the Convention providing for an effective remedy was not included as a protected right in the Human Rights Act. The solution—declarations of incompatibility in the face of Acts of Parliament violating human rights—is far from a meaningful remedial solution. See *Burden v. United Kingdom* [GC], 2008-III Eur. Ct. H.R. 49 paras. 22, 40–44.

⁶⁹ HOME OFFICE, RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL, 1997, Cm. 3782, at 2–6 (U.K.) [hereinafter RIGHTS BROUGHT HOME].

⁷⁰ Tony Blair, *Preface by the Prime Minister to RIGHTS BROUGHT HOME*, *supra* note 69, at 1.

⁷¹ Prior to the HRA, rights in the British system were protected through the common law. Dicey thought the evolutionary approach of common law preferable to the “paper” documents protecting rights in systems such as the French (or, though he did not draw the contrast, the American). Cf. HILAIRE BARNETT, CONSTITUTIONAL AND ADMINISTRATIVE LAW 119 (3d ed. 2000) (noting that “it might be necessary to research hundreds of years of case law” to understand the scope and content of a given right). For a brief synopsis of rights protection in the United Kingdom in an American comparative perspective, see Douglas W. Vick, *The Human Rights Act and the British Constitution*, 37 TEX. INT'L L.J. 329 (2002).

domestic legal orders.⁷² In this light, the Human Rights Act appears modernizing but not shocking to the constitutional system. The modernizing story, however, does not provide the full import of the Act.

The benefit of rights documents lies in their ability to entrench protections of minorities against the potential discriminatory actions of majoritarian government. But the Blair government went to great lengths to reassure observers that the HRA would not challenge in any way the principle of parliamentary sovereignty. As the Home Secretary, a Cabinet minister,⁷³ stated in debate over the bill:

The sovereignty of Parliament must be paramount. By that, I mean that Parliament must be competent to make any law on any matter of its choosing. . . . The authority to make those decisions derives from a democratic mandate. . . . To allow the courts to set aside Acts of Parliament would confer on the judiciary a power that it does not possess, and which could draw it into serious conflict with Parliament.⁷⁴

In short, “bringing rights home” was not intended to change the fact that Parliament, in its infinite wisdom, could choose to pass a law that violated the Convention, with only the democratic process as a check on its power.

The details of the HRA thus set out to reconcile the seemingly irreconcilable—robust parliamentary sovereignty and entrenched rights protection against government action—and scholars disagree about in which direction the results trend.⁷⁵ It is possible to view the HRA as a mechanism to ensure procedural attention to rights issues rather than as an attempt to provide rights entrenchment.⁷⁶ For example, Section 19 of the Act provides for an enhanced parliamentary process, in which the minister in charge of a bill must make a written statement either attesting to the

⁷² In the Preface, Blair made clear that the introduction of the Human Rights Act was part of the government’s “decision to put the promotion of human rights at the forefront of our foreign policy.” Blair, *supra* note 70. For a discussion of monist European states that apply the Convention as part of their domestic law, see Rainer Arnold, *Reflections on the Universality of Human Rights*, in 16 THE UNIVERSALISM OF HUMAN RIGHTS 1, 6–7 (Rainer Arnold ed., 2013).

⁷³ Cabinet ministers are collectively responsible for government policy. Cabinet Office, Ministerial Code para. 2.3 (2010) (U.K.).

⁷⁴ 306 PARL. DEB., H.C. (6th ser.) (1998) 770 (U.K.).

⁷⁵ See BOGDANOR, *supra* note 7, at 68 (Bogdanor describes the HRA as an uneasy “compromise between the doctrines of Parliamentary sovereignty and that of the rule of law. It seeks in a sense to muffle the conflict by proposing a dialogue between the judiciary, Parliament and government, all of whom are required to observe human rights.”).

⁷⁶ As noted in *Rights Brought Home*:

To make provision in the Bill for the courts to set aside Acts of Parliament would confer on the judiciary a general power over the decisions of Parliament which under our present constitutional arrangements they do not possess, and would be likely on occasions to draw the judiciary into serious conflict with Parliament. There is no evidence to suggest that they desire this power, nor that the public wish them to have it. Certainly, this Government has no mandate for any such change.

RIGHTS BROUGHT HOME, *supra* note 69, para. 2.13.

compatibility of the bill with the Convention rights or, if incompatible, clearly acknowledging the government's intent "to proceed with the Bill" nevertheless.⁷⁷ By placing a responsibility on the government to assess the rights implications of any proposed legislation, the HRA enhances the potential for democratic accountability to function as a constraint on Parliament. But the Act does not rest on political accountability alone: in addition to procedural mechanisms within the parliamentary process, Sections 3 and 4 introduce a role for the courts in rights protection. Under these sections, courts have new responsibilities in interpreting or reviewing primary legislation passed by Parliament.⁷⁸

Section 3 provides what might be best understood as a canon of interpretation to be used by the courts, by stating that "[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."⁷⁹ This interpretive measure goes beyond the traditional canons of statutory construction,⁸⁰ and it does not incorporate a notion of deference to legislative choice.⁸¹ Courts have been willing to use the power: in *R (Hammond) v. Secretary of State for the Home Department*, the Criminal Justice Act of 2003, requiring High Court judges to conduct certain criminal review procedures without an oral hearing, was interpreted to include *implied* judicial discretion to order an oral hearing if necessary to comply with Convention rights.⁸² Furthermore, this power to interpret Acts of Parliament in light of the HRA has been understood as imparting some

⁷⁷ Human Rights Act, 1998, c. 42, § 19 (U.K.).

⁷⁸ Note that rights review is also relevant for secondary legislation. Procedural review of executive or administration action preexisted the HRA, but even that review was a fairly recent element of British jurisprudence, stemming from the standards of reasonableness outlined in the *Wednesbury* case of 1947. *Associated Provincial Picture Houses Ltd v. Wednesbury Corp.*, [1947] EWCA (Civ) 1, [1948] 1 K.B. 223. From both an American and European perspective, *Wednesbury* reasonableness review is a very weak form of review—a level of deference more *Skidmore* than *Chevron*, and nothing as searching as the proportionality review used by the European Court of Human Rights in interpreting the Convention. See *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). On proportionality, see generally NICHOLAS EMILIOU, *THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW* (1996). See also Michael Taggart, *Proportionality, Deference, Wednesbury*, 2008 N.Z. L. REV. 423, 427–40 (discussing *Wednesbury* review and proportionality review in U.K. law).

⁷⁹ Human Rights Act, 1998, c.42, § 3.

⁸⁰ See MASTERMAN, *supra* note 2, at 152 ("[I]t is widely acknowledged that the HRA provides the judiciary with much broader powers of interpretation than provided for by the traditional canons of statutory construction."). The judicial interpretation of the HRA is not subject to ambiguity rules, nor limited by enactments passed earlier in time. See, e.g., *R v. A*, [2001] UKHL 25, [2002] 1 A.C. 45 (H.L.) [44] (appeal taken from Eng.) (Lord Steyn) ("[I]t will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions.").

⁸¹ See MASTERMAN, *supra* note 2, at 172.

⁸² [2005] UKHL 69, [2006] 1 A.C. 603 (appeal taken from Eng.).

level of entrenchment to the HRA itself.⁸³ Lord Justice Laws, in the much-referenced case *Thoburn v. Sunderland City Council*, concluded that the HRA was a “constitutional statute” and could not be impliedly repealed by subsequent legislation, placing on Parliament the burden of explicit repeal.⁸⁴

Section 4 authorized the Appellate Committee of the House of Lords (Britain’s highest court in 1998) and the high courts of the regions to declare a piece of primary legislation “incompatible” with the HRA. Such a declaration does not “affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and . . . is not binding on the parties to the proceedings in which it is made.”⁸⁵ There is, therefore, no power to strike down acts passed by Parliament.⁸⁶ Some commentators see Section 3 as undermining parliamentary sovereignty, given the judges’ power “to control the interpretation of legislation not yet passed,” and Section 4 as preserving parliamentary sovereignty, given that “the continuing legality of [incompatible legislation] remains unquestioned.”⁸⁷ Section 4 may nevertheless present a pragmatic challenge to parliamentary sovereignty. Even though “the *legality* of challenged Acts remains unquestioned, the difference between a direct power [to] strike down [an Act], and the potential for a declaration of incompatibility to undermine the political authority of a statute or its provisions, may be a fine one.”⁸⁸ As James Madison said, though they appear weak, paper barriers “have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, [and] may be one means to control the majority from those acts to which they might be otherwise

⁸³ Alison Young argues that rights can be entrenched without undermining parliamentary sovereignty, but her argument requires some reinterpretation of Dicey and a reformulated definition of parliamentary sovereignty. See YOUNG, *supra* note 44. Young proposes that “Dicey’s theory is best understood as a theory of ‘continuing parliamentary legislative supremacy,’” *id.* at 15, and that there is the “possibility of entrenchment within [this] theory . . . through the modification of the definition of legally valid legislation, provided that such modification cannot be made by Parliament acting alone.” *Id.* at 23.

⁸⁴ [2002] EWHC (Admin) 195, [2003] Q.B. 151 [62]–[63]. More recently, in Parliamentary Debate, Lord Pannick argued, “one of the central purposes of human rights law is to protect the interests of those sections of the community who lack political power, who Parliament has failed to protect against unfair treatment by the majority.” 727 PARL. DEB., H.L. (5th ser.) (2011) 1502 (U.K.).

⁸⁵ Human Rights Act, 1998, c. 42, § 4 (U.K.).

⁸⁶ This fact raises questions about whether Section 4 is truly an “effective remedy” for a victim of a rights violation, for purposes of Article 13 of the Convention. See, e.g., *Burden v. United Kingdom* [GC], 2008-III Eur. Ct. H.R. 49, para. 39.

⁸⁷ MASTERMAN, *supra* note 2, at 48.

⁸⁸ *Id.* at 152.

inclined.”⁸⁹ And, in fact, to date, most declarations of incompatibility have been quickly remedied.⁹⁰

One final aspect of the HRA that bears noting is its recalibration of the British courts’ relationship to the ECtHR. Prior to 1998, individuals could not enforce their Convention rights in British courts, and British courts were not inclined to take ECtHR decisions into account when developing rights under the common law. Now, however, courts and tribunals “*must* take into account” relevant judgments of the ECtHR when addressing rights questions under the HRA.⁹¹ The judgments of the ECtHR are not binding, but the HRA encourages the opening of a dialogue between the ECtHR and the British courts. As the White Paper noted, “British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe.”⁹²

B. *The Devolution Acts (1998 et seq.)*

Even prior to the series of Acts that in 1998 devolved power to Northern Ireland, Scotland, and Wales, scholars had struggled with categorizing the structure of the United Kingdom—it has always been something of a compilation.⁹³ The United Kingdom came into being

⁸⁹ 1 ANNALS OF CONG. 437 (1789) (Joseph Gales ed., 1834) (James Madison).

⁹⁰ In fact, between 2000, when the HRA went into effect, and July 2012, there were nineteen declarations of incompatibility not subject to appeal. Of these (as of July 31, 2012), eleven had been remedied by subsequent primary legislation; three were “remedied by a remedial order under” HRA Section 10; four “had already been remedied by primary legislation at the time of the declaration” for incompatibility; and one was under consideration. See MINISTRY OF JUSTICE, RESPONDING TO HUMAN RIGHTS JUDGMENTS, REPORT TO THE JOINT COMMITTEE ON HUMAN RIGHTS ON THE GOVERNMENT RESPONSE TO HUMAN RIGHTS JUDGMENTS 2011–12, 2012, Cm. 8432, at 40 (U.K.). The response by Parliament to the Court suggests some support for James R. Rogers’s theory that a legislature might seek to enable judicial review as an information-forcing benefit. He has argued, in the American context, that judicial review allows for signaling between Congress and the Court. Because Congress cannot know *ex ante* if its legislation will be effective or achieve its intended goals, it must rely on the Court’s unique form of *ex post* review to provide further information to aid in recalibration or correction. See Rogers, *supra* note 12, at 84–85. For an updated analysis of Section 4 (s4) incompatibility declarations (including a twentieth declaration that is under consideration), see Jeff King, *Parliament’s Role Following s4 Declarations of Incompatibility*, in PARLIAMENTS AND HUMAN RIGHTS: REDRESSING THE DEMOCRATIC DEFICIT (Murray Hunt et al. eds., forthcoming 2014) (on file with author).

⁹¹ Human Rights Act, 1998, c. 42, § 2 (U.K.) (emphasis added).

⁹² RIGHTS BROUGHT HOME, *supra* note 69, para. 1.14.

⁹³ See, e.g., Stein Rokkan & Derek W. Urwin, *Introduction* to THE POLITICS OF TERRITORIAL IDENTITY: STUDIES IN EUROPEAN REGIONALISM 1, 11–12 (Stein Rokkan & Derek W. Urwin eds., 1982) (describing the United Kingdom as a “union state” made up of different nations); Stephen Tierney, *Rights Versus Democracy? The Bill of Rights in Plurinational States*, in RIGHTS IN DIVIDED SOCIETIES 11, 11, 13–14 (Colin Harvey & Alex Schwartz eds., 2012) (describing the U.K. as a “[p]lurinational” state); see also Brigid Hadfield, *The United Kingdom as a Territorial State*, in THE BRITISH CONSTITUTION IN THE TWENTIETH CENTURY, *supra* note 54, at 585, 585 (noting that “[t]he Speaker’s Conference on Devolution, which reported in 1920, used the term ‘component portions’” to describe the subnational entities making up the United Kingdom).

through a series of agreements in the eighteenth and nineteenth centuries, beginning with the 1707 Acts of Union, in which the Kingdom of England and Wales was united with the Kingdom of Scotland, to be known as “Great Britain” and ruled by a united Parliament at Westminster.⁹⁴ And in 1800, another set of Acts united the Kingdom of Great Britain with that of Ireland, leading to the creation of the United Kingdom of Great Britain and Ireland.⁹⁵ In 1922, Southern Ireland achieved a measure of independence,⁹⁶ eventually cutting all ties to Britain and becoming the Republic of Ireland in 1949.⁹⁷ Northern Ireland elected to remain within the United Kingdom.

Notwithstanding scholarly arguments that the 1707 and 1800 Acts of Union had a confederal nature,⁹⁸ in practice the Acts incorporated the new regions into the dominant English system.⁹⁹ And it is thus unsurprising that after their passage, various subgroups immediately sought more power. In Ireland, union led only to the long and painful process of separation.¹⁰⁰ Scottish separation has proceeded at a slower pace. The 1707 Act of Union with Scotland contemplated a Scottish Office within the British bureaucracy to represent Scottish interests, but it was not until the late nineteenth century that the Scottish Secretary took on an important role in the British Cabinet.¹⁰¹ Pressure for devolution mounted in the late 1960s and 1970s with the electoral successes of the Scottish National Party.¹⁰² Finally, in Wales, the movement for localized power has been more recent; notwithstanding electoral success by the Welsh national party, Plaid Cymru, in the 1960s, the people of Wales have been slower to seek autonomy.¹⁰³ Alone among the four nations, England has not sought

⁹⁴ Union with Scotland (Amendment) Act, 1707, 6 Ann., c. 40 (Eng.); Union with England Act, 1707, 6 Ann., c. 7 (Scot.). Wales had been incorporated into England earlier, through the Laws of Wales Acts in 1535 and 1542. Laws in Wales Act, 1535, 27 Hen. 8, c. 26 (Eng.); Laws in Wales Act, 1542, 34 & 35 Hen. 8, c. 26 (Eng.).

⁹⁵ Union with Ireland Act, 1800, 39 & 40 Geo. 3, c. 67 (Gr. Brit.); Act of Union (Ireland), 1800, 40 Geo. 3, c. 38 (Ir.).

⁹⁶ See Articles of Agreement for a Treaty Between Great Britain and Ireland, Dec. 6, 1921, U.K.-Ire., 114 B.S.P. 161 (Anglo-Irish Treaty of 1921); The Irish Free State Constitution Act, 1922 (Session 2), 13 Geo. 5, c. 1.

⁹⁷ See generally ALVIN JACKSON, HOME RULE: AN IRISH HISTORY 1800–2000 (2003) [hereinafter JACKSON, HOME RULE].

⁹⁸ See, e.g., J.D.B. MITCHELL, CONSTITUTIONAL LAW 69–70 (2d ed. 1968) (discussing the intentions of negotiators).

⁹⁹ ALVIN JACKSON, THE TWO UNIONS: IRELAND, SCOTLAND, AND THE SURVIVAL OF THE UNITED KINGDOM, 1707–2007, at 108 (2012) [hereinafter JACKSON, TWO UNIONS] (describing the Acts as “not so much about the union of parliaments, as about the incorporation of the Scots and Irish legislatures within those of England and Great Britain”).

¹⁰⁰ See generally JACKSON, HOME RULE, *supra* note 97.

¹⁰¹ See JACKSON, TWO UNIONS, *supra* note 99, at 141.

¹⁰² See MITCHELL, *supra* note 17, at 111–27.

¹⁰³ *Our History*, PARTY OF WALES, <http://www.partyofwales.org/our-history> (last visited Mar. 23, 2014). In 1979, referendums were held in Wales and in Scotland on devolution, and only 20.3% of the Welsh voting public sought greater autonomy. In Scotland, the number was 51.6%. See RICHARD 562

independence or national power, most likely because England is the largest of the regions and most often treated as synonymous with the whole.¹⁰⁴ Given this history of devolved power being both sought and granted, some view the 1998 reforms as points along a continuum of change, not a fundamental reset or restructuring of the “State.”¹⁰⁵

The devolution acts—the Scotland Act (1998), the Government of Wales Act (1998), and the Northern Ireland Act (1998)—divide legislative responsibilities between Westminster and the institutions of the devolved regions. The focus in this Article will be on devolution in Scotland, which “is perhaps the best example of possible internal transformations in the concept of sovereignty,” due to its “historical claims to self-government.”¹⁰⁶ The asymmetry inherent in the devolutionary settlement complicates a detailed analysis of all three regions. Not only do specific substantive powers differ amongst the regions, but initially only Scotland and Northern Ireland had power to enact primary legislation in the Scottish Parliament and Northern Ireland Assembly, respectively. The National Assembly for Wales was given a more marginal range of powers and authority. Although recent legislation has expanded its remit to include primary legislative authority,¹⁰⁷ the Welsh Assembly is only beginning to engage with major questions of divided power. And Northern Ireland is likewise idiosyncratic. The structure of its devolutionary settlement is quite different from that of Wales or Scotland: the agreement providing for devolution in Northern Ireland was signed by the United Kingdom and Ireland, two sovereign states.¹⁰⁸

At a high level of generality, these new institutions at the regional level “did not involve a revolution in constitutional design.”¹⁰⁹ The integrity of parliamentary sovereignty is upheld as a *de jure* matter: Parliament devolved power and, in theory, could take it back. The Blair government articulated this principle clearly, maintaining that devolution was no more than an effort to modernize the constitution, and that the Westminster Parliament would “remain sovereign in all matters.”¹¹⁰ Under Section 28 of

DEWDNEY, HOUSE OF COMMONS LIBRARY, RESEARCH PAPER 97/113, RESULTS OF DEVOLUTION REFERENDUMS (1979 & 1997) 9–10 (1997).

¹⁰⁴ For example, Bagehot’s book is entitled *The English Constitution* rather than *The British Constitution* or *The Constitution of the United Kingdom*. See WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* (2d ed. rev. ed. 1873).

¹⁰⁵ See, e.g., MITCHELL, *supra* note 17, at 13 (decrying “Year Zero” assumptions about the Blair government’s reforms).

¹⁰⁶ David Jenkins, *Both Ends Against the Middle: European Integration, Devolution, and the Sites of Sovereignty in the United Kingdom*, 16 *TEMP. INT’L & COMP. L.J.* 1, 17 (2002).

¹⁰⁷ Government of Wales Act, 2006, c. 32 (U.K.).

¹⁰⁸ See BOGDANOR, *supra* note 7, at 90–93.

¹⁰⁹ MITCHELL, *supra* note 17, at 15.

¹¹⁰ *Id.* at 134–35 (citing SCOTLAND OFFICE, SCOTLAND’S PARLIAMENT, 1997, Cm. 3658, at para. 4.2) (“The UK Parliament is and will remain sovereign in all matters: but as part of the Government’s

the Scotland Act of 1998,¹¹¹ the Scottish Parliament (Holyrood) is given power to make primary laws under a “general legislative competence,”¹¹² which is subject to a set of limitations.¹¹³ Critically, “[t]he power of the Westminster Parliament to make laws for Scotland is not affected by Scotland’s power to make laws” for Scotland.¹¹⁴

As with the HRA, the political ramifications of devolution present a somewhat different picture.¹¹⁵ The power-sharing principles that underlie devolution have been consistently reinforced, including through the construction of a £414 million Scottish Parliament building in Edinburgh,¹¹⁶ the use of conventions establishing practices of dialogue and consent between the two parliaments;¹¹⁷ and, most recently, the Scotland Act of 2012, amending and clarifying the 1998 Act.¹¹⁸ As Lord Steyn has written, “A real federal element has *de facto* been entrenched in our constitutional

resolve to modernise the British constitution Westminster will be choosing to exercise that sovereignty by devolving legislative responsibilities to a Scottish Parliament without in any way diminishing its own power.”)

¹¹¹ Scotland Act, 1998, c. 46, § 28 (U.K.).

¹¹² See Paul Craig & Mark Walters, *The Courts, Devolution and Judicial Review*, 1999 P.L. 274, 274.

¹¹³ A provision is outside the Scottish Parliament’s competence if:

- (a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,
- (b) it relates to reserved matters,
- (c) it is in breach of the restrictions in Schedule 4,
- (d) it is incompatible with any Convention rights or with EU law,
- (e) it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Scotland Act, 1998, c. 46, § 29(2) (U.K.) (footnote and alterations omitted). Aside from a list of Acts that the Scottish Parliament cannot alter, Schedule 4 also states that “[a]n Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, the law on reserved matters.” *Id.* sched. 4, para. 2(1). This has been amended in important ways by the Scotland Act 2012. For a discussion, see *infra* Part III.B.

¹¹⁴ Craig & Walters, *supra* note 112, at 281.

¹¹⁵ “Technically Parliament could repeal the Scotland Act or the Human Rights Act, because neither is entrenched; but politically it is inconceivable.” Hazell, *supra* note 4, at 86. In fact, there was a political movement to repeal the HRA in 2012, but Members of Parliament (MPs) defeated the proposal. See *MPs Block Human Rights Act Repeal Bid*, BBC NEWS (Dec. 4, 2012, 10:06 AM), <http://www.bbc.co.uk/news/uk-politics-20598122>.

¹¹⁶ See *£414m Bill for Holyrood Building*, BBC NEWS (Feb. 21, 2007, 3:37 PM), http://news.bbc.co.uk/2/hi/uk_news/scotland/6382177.stm.

¹¹⁷ The Sewel Convention, which was developed in the course of negotiations over Scottish devolution and is reflected in Devolution Guidance Note 10, establishes the practice that “Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.” 592 PARL. DEB., H.L. (5th ser.) (1998) 791 (U.K.); see also Scotland Act, 1998, c. 46, Explanatory Notes, at 40 (noting that Lord Sewel’s statement in the House of Lords “has come to be known as the Sewel Convention”).

¹¹⁸ Scotland Act, 2012, c. 11 (U.K.).

arrangements. The simplistic views of Dicey do not fit the contours of modern Britain.¹¹⁹ These changes are becoming “irreversible.”¹²⁰

The practical difficulty of rolling back devolution is not the only aspect of the 1998 devolutionary settlement that suggests tension with parliamentary sovereignty in Westminster. Other elements are notable for their divergence from traditional constitutional practices, such as the decision by the Blair government to hold regional referendums on devolution prior to introducing devolution legislation in Parliament.¹²¹ Referendums highlight the tension between parliamentary sovereignty and any conception of popular sovereignty.¹²² These regional referendums were not binding on Parliament, but some scholars argue that in providing popular political support to devolution, the referendums have shifted its constitutional meaning.¹²³ Due to the preceding referendum in support,¹²⁴ the Scotland Act can be seen not merely as a devolution of power from Westminster to Holyrood, but as “quasi-autochthonous”¹²⁵—a “self-generated . . . constitution” in which “the authority of the Scottish Parliament rests less on the sovereign legislative power of Westminster than on the consent of the Scottish people themselves.”¹²⁶

The “self-generating” nature of the Scotland Act is reinforced by the events in the early 1990s that led to devolution: the Scottish Constitutional Convention (SCC), convened in 1989, met and developed plans for the new parliament, “much of which formed the basis for the Scotland Act 1998.”¹²⁷ Described as “part political coalition, part a more broadly-based movement in civil society,”¹²⁸ the SCC instantiated the idea of popular sovereignty in

¹¹⁹ JOHAN STEYN, *DEMOCRACY THROUGH LAW* xvi–xvii (2004) (Lord of Appeal in Ordinary).

¹²⁰ Hazell, *supra* note 4, at 86.

¹²¹ BOGDANOR, *supra* note 7, at 91–92.

¹²² See *supra* Part I; see also Loughlin, *supra* note 30, at 47 (“[A]ll the most basic constitutional ideas—such as sovereignty (does it vest in the commons, or in the crown-in-parliament?), the people (do they speak through their local communities, or the several nations, or is this purely as an abstraction?), or rights (are these a set of ‘fundamental’ claims or simply concessions conferred by law?)—ha[ve] remained in a state of irresolution.”).

¹²³ See BOGDANOR, *supra* note 7, at 274; Hadfield, *supra* note 93, at 626.

¹²⁴ Scottish referendum results were clear: with a turnout of 60.2%, the electorate was strongly in favor of the establishment of a Scottish Parliament—74.3% for, and 25.7% against. In contrast, in Wales the populace was evenly divided in 1997, with 50.3% voting for devolution and 49.7% voting against (50.1% turnout). A new Welsh referendum was held in 2011, in which the question was posed: “Do you want the Assembly now to be able to make laws on all the matters in the 20 subject areas it has powers for?” The turnout was low—only 35.6%—but the yes vote garnered 63.5% and the opposition only 36.5%. FEARGAL MCGUINNESS ET AL., HOUSE OF COMMONS LIBRARY, RESEARCH PAPER 12/43, UK ELECTION STATISTICS: 1918–2012, at 51–53 (2012), available at <http://www.parliament.uk/briefing-papers/rp12-43.pdf>.

¹²⁵ See Hadfield, *supra* note 93, at 626.

¹²⁶ BOGDANOR, *supra* note 7, at 274.

¹²⁷ Hadfield, *supra* note 93, at 623 (footnote omitted).

¹²⁸ Hazell, *supra* note 4, at 87.

Scotland, and at the 1999 opening of the Scottish Parliament, the SCC's "Claim of Right was ceremonially handed over to the Parliament's presiding officer for its future keeping."¹²⁹ Between the referendum on devolution, the role of the SCC, and the success of the Scottish National Party, there is now a "key focus for patriotism far removed from the British state."¹³⁰ The burgeoning of this Scottish national feeling is most clearly identified in the successful efforts of Alex Salmond, the First Minister of Scotland, to arrange a nonbinding referendum on Scottish Independence. That referendum is scheduled to take place in September 2014.¹³¹

Parliamentary sovereignty might be undermined by the introduction of popular sovereignty and competing subnational parliamentary institutions; yet this potential weakening of Westminster does not, in itself, suggest a shift from political constitutionalism to legal constitutionalism. Centrifugal political forces are not necessarily external constitutional limitations. But devolution presents an additional factor to the constitutional analysis: the introduction of judicial review. Federalism itself was considered by Dicey to be incompatible with the concept of parliamentary sovereignty.¹³² To the extent that division of power required a "fundamental compact, the provisions of which control every authority existing under the

¹²⁹ Hadfield, *supra* note 93, at 623.

¹³⁰ JACKSON, TWO UNIONS, *supra* note 99, at 179.

¹³¹ The Scottish National Party (SNP), led by Alex Salmond, is the dominant proponent of an independent Scotland, having reiterated its commitment to an independence referendum through its party manifesto for the 2011 Scottish parliamentary election, in which it won an absolute majority. SCOTTISH NAT'L PARTY, MANIFESTO 2011, at 28 (2011), available at http://votesnp.com/campaigns/SNP_Manifesto_2011_lowRes.pdf. Following "more than eight months of intense negotiations," Salmond and U.K. Prime Minister David Cameron signed the Edinburgh Agreement on October 15, 2012, granting Holyrood the authority to hold the referendum. See Severin Carrell & Nicholas Watt, *Alex Salmond Hails Historic Day for Scotland After Referendum Deal*, GUARDIAN (Oct. 15, 2012, 3:03 PM), <http://www.guardian.co.uk/politics/2012/oct/15/alex-salmond-scotland-referendum-deal>. Pursuant to the recommendation of the Electoral Commission, the referendum question will read: "Do you agree that Scotland should be an independent country? Yes/No." SCOTTISH GOV'T, YOUR SCOTLAND, YOUR REFERENDUM 11 (2012). A third option, in the form of greater devolution and more powers for Holyrood, will not be available on the referendum ballot (Downing Street denied Salmond's demand for a two-question referendum), but it appears to be the most favored approach in Scotland. See James Mitchell, *The Scottish Independence Referendum Will Not Offer What Most Scots Want*, GUARDIAN (Oct. 15, 2012, 7:28 AM), <http://www.guardian.co.uk/politics/2012/oct/15/scottish-independence-referendum-offer-scots>. The coalition leading the official campaign in favor of a "yes" vote on the referendum—"Yes Scotland"—is made up of the SNP, with support from the Scottish Green Party, the Scottish Socialist Party, and Solidarity. See YES SCOTLAND, <http://www.yesscotland.net> (last visited Mar. 23, 2014). All three U.K. parties—Labour, the Conservatives, and the Liberal Democrats—oppose Scottish independence, and have collectively backed the pro-Union "Better Together" campaign. See BETTER TOGETHER, <http://www.bettertogether.net> (last visited Mar. 23, 2014).

¹³² See A.V. DICEY, ENGLAND'S CASE AGAINST HOME RULE viii (3d ed. London, John Murray 1887) ("I entertain the firmest conviction that any scheme for Home Rule in Ireland involves dangerous if not fatal innovations on the Constitution of Great Britain."); see also MITCHELL, *supra* note 17, at 7 ("The idea of parliamentary sovereignty was central to A.V. Dicey's arguments against Irish home rule and would influence debates on Scotland and Wales later.").

constitution,” there was no way to integrate such limitations with an absolute legislative power.¹³³ A neutral arbiter would be necessary to police the bounds.¹³⁴ Given the legal ability of Westminster to undo its grants of power to Scotland, the British system is not “federal,” it is devolved.¹³⁵ But to the extent that, politically or pragmatically, devolution cannot be undone, the Scotland Act begins to take on the appearance of a federal compact.

The Scotland Act 1998 recognized that “devolution issues”—questions concerning the scope of the power granted to the devolved level—were likely to arise.¹³⁶ It was decided that the Judicial Committee of the Privy Council would be given jurisdiction to hear and decide upon these issues.¹³⁷ The Appellate Committee of the House of Lords, the U.K.’s highest court in civil litigation and most criminal litigation, was deliberately not given this responsibility. As Lady Hale of Richmond, a sitting Justice of the Supreme Court, has explained, “as long as the apex court of the United Kingdom was a committee of the Westminster Parliament, it might not be seen as an independent and impartial judge of a dispute between that Parliament and the devolved institutions.”¹³⁸

The Privy Council was both an obvious and unusual choice for this role. It is an institution with experience in the demarcation of boundaries

¹³³ DICEY, *supra* note 25, at 141.

¹³⁴ K.C. WHEARE, *FEDERAL GOVERNMENT* 58–59 (4th ed. 1963).

¹³⁵ See M.A. FAZAL, *A FEDERAL CONSTITUTION FOR THE UNITED KINGDOM* 15 (1997).

¹³⁶ The Act defined “devolution issue” to mean:

- (a) a question whether an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament is within the legislative competence of the Parliament,
- (b) a question whether any function (being a function which any person has purported, or is proposing, to exercise) is a function of the Scottish Ministers, the First Minister or the Lord Advocate,
- (c) a question whether the purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, within devolved competence,
- (d) a question whether a purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, incompatible with any of the Convention rights or with EU law,
- (e) a question whether a failure to act by a member of the Scottish Executive is incompatible with any of the Convention rights or with EU law,
- (f) any other question about whether a function is exercisable within devolved competence or in or as regards Scotland and any other question arising by virtue of this Act about reserved matters.

Scotland Act, 1998, c. 46, sched. 6, para. 1 (footnotes and alterations omitted) (note that the references to EU law were added after the ratification of the Treaty of Lisbon in 2011). The Scotland Act 2012 changes this definition and designation to “compatibility issue[s].” Scotland Act, 2012, c. 11, § 34. For discussion, see *infra* Part III.

¹³⁷ Scotland Act, 1998, c. 46, sched. 6 (original version referring to judicial committee), available at <http://www.legislation.gov.uk/ukpga/1998/46/schedule/6/enacted>.

¹³⁸ Brenda Hale, *From County Hall to Supreme Court*, in *THE SUPREME COURT OF THE UNITED KINGDOM* 12, 23 (Chris Miele ed., 2010).

inherent in federalism, due to its role in hearing litigation arising from overseas territories, dependencies, and the Commonwealth—countries and political systems with historic links to the British Empire. In particular, the Privy Council conducts review of provincial legislation for conformity with parliamentary acts.¹³⁹ But this natural substantive strength also presented a threat. In the 1970s, when the first meaningful political discussion of devolution for Scotland took place, the bureaucrats meeting to discuss possible legislation “rejected a ‘constitutional tribunal such as the Judicial Committee of the Privy Council’ as ‘entirely contrary to the spirit of devolution within a unitary state with one sovereign Parliament.’ This, they maintained, ‘should not be contemplated.’”¹⁴⁰ Their concern was undoubtedly driven by the fact that the Privy Council played an important constitutional role during the first half of the twentieth century, encouraging a “flirtation” with the idea of judicial review.¹⁴¹ However, by 1998, the Privy Council’s “constitutional jurisdiction in the rest of the Commonwealth ha[d] declined almost to zero,” and it had little of the strength and stature of the Appellate Committee in the House of Lords.¹⁴² The earlier threats seemed of little relevance.

At the time, “devolution issues” were expected to be solely questions regarding the interpretation of the devolution acts and the division of competences therein—in other words, litigation focused on which level of government could legislate on what subjects. And the Scotland Act, like the HRA, provided a canon of construction for the courts when addressing devolution issues: Section 101 requires courts to make every effort to interpret primary and secondary legislation from Scotland as *vires*, even if such a reading requires narrowing the legislation in question.¹⁴³ In 2003, constitutional scholar Nevil Johnson considered it unlikely that “frequent reference” would be made to the Privy Council and assumed, as did many, that most devolution issues would be resolved through political means.¹⁴⁴

Johnson was right, insofar as “devolution issues” remained questions of the interpretation of the Scotland Act. But rather than litigation surrounding the meaning of reserved or delegated powers, most challenges claimed Scottish legislation, or acts of the Scottish executive, were *ultra vires* due to their incompatibility with the Convention.¹⁴⁵ These devolution issues raising rights questions were still addressed by the Judicial

¹³⁹ Stefan Voigt et al., *Improving Credibility by Delegating Judicial Competence—The Case of the Judicial Committee of the Privy Council*, 82 J. DEV. ECON. 348, 355–56 (2007) (discussing the history, jurisdiction, and institutional design of the Privy Council).

¹⁴⁰ MITCHELL, *supra* note 17, at 120–21.

¹⁴¹ Stevens, *supra* note 54, at 333, 340, 342.

¹⁴² Hazell, *supra* note 4, at 93.

¹⁴³ Scotland Act, 1998, c. 46, § 101.

¹⁴⁴ See NEVIL JOHNSON, *RESHAPING THE BRITISH CONSTITUTION* 195 (2004).

¹⁴⁵ See *infra* Part III.

Committee of the Privy Council as the court of last resort, but in all other cases, final HRA interpretation rested with the Appellate Committee of the House of Lords. The possibility of conflicting interpretations of rights and other tensions between the two courts only highlighted the lack of attention given by the government to the impact of devolution on the judiciary.¹⁴⁶ This latter anomaly was resolved through the enactment of the Constitutional Reform Act of 2005, which introduced a Supreme Court to the United Kingdom.

C. *The Constitutional Reform Act (2005)*

On June 12, 2003, in a press release concerning a Cabinet reshuffle,¹⁴⁷ the Blair government stated its intention to abolish the office of the Lord Chancellor and remake the Appellate Committee of the House of Lords into a Supreme Court for the United Kingdom.¹⁴⁸ Earlier announcements of proposed constitutional change may have seemed incoherent when viewed in the aggregate,¹⁴⁹ but no individual proposal was as poorly presented as these changes to the judiciary.¹⁵⁰ The government failed to conduct consultations,¹⁵¹ and “[s]enior members of the judiciary . . . were given only a few hours’ or minutes’ notice of the announcement.”¹⁵² As Lord Woolf said, “it came as an immense shock.”¹⁵³ The government’s announcement created something of a firestorm—or as much of a firestorm as can exist in

¹⁴⁶ Cf. Hazell, *supra* note 4, at 93 (“In the government more thought has been given to the judicial impact of [the HRA] than of devolution.”). The likelihood of conflict may have been mitigated by the fact that there is considerable overlap in the judges who staff both the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council.

¹⁴⁷ CHARLES BANNER & ALEXANDER DEANE, OFF WITH THEIR WIGS! 19 (2003).

¹⁴⁸ DEP’T FOR CONSTITUTIONAL AFFAIRS, CONSTITUTIONAL REFORM: A SUPREME COURT FOR THE UNITED KINGDOM, CP 11/03, at 4–6 (2003), <http://www.dca.gov.uk/consult/supremecourt/supreme.pdf>; Andrew Le Sueur, *From Appellate Committee to Supreme Court: A Narrative*, in THE JUDICIAL HOUSE OF LORDS 1876–2009, at 64 (Louis Blom-Cooper et al. eds., 2009).

¹⁴⁹ See *supra* notes 145–46 and accompanying text (discussing the lack of forethought concerning legal issues presented by the interaction between the devolution acts and the HRA).

¹⁵⁰ Less than eight months after the initial proposal, Prime Minister Tony Blair “conceded that combining constitutional reforms with a Cabinet reshuffle . . . had not been a good idea: ‘I think we could have in retrospect—this is entirely my responsibility—done it better.’” Le Sueur, *supra* note 148, at 75 (quoting Rt. Hon. Tony Blair, House of Commons Liaison Committee, Minutes of Evidence, Feb. 3, 2004); see also Tom Bingham, *Law Lords and Justices*, in THE SUPREME COURT OF THE UNITED KINGDOM, *supra* note 138, at 36, 38 (Lord Bingham of Cornhill, Senior Law Lord of the United Kingdom; Lord Chief Justice) (“Early indications were that the proposals had not been very fully thought out.”).

¹⁵¹ Judges pointed out that the previous round of changes to the judicial architecture, implemented between 1867 and 1876, had benefited from consultations with various committees and a Royal Commission. Bingham, *supra* note 150, at 38 (Lord Bingham of Cornhill, Senior Law Lord of the United Kingdom; Lord Chief Justice).

¹⁵² Le Sueur, *supra* note 148, at 71.

¹⁵³ *Id.* (citing Lord Woolf, Speech at the University of Hertfordshire: A New Constitutional Consensus (Feb. 10, 2005)).

the measured and judicious remarks of the senior judiciary.¹⁵⁴ Even those inclined to agree with the need for change were dismayed by the lack of thought put into the proposal.¹⁵⁵

The proposed reforms were “initially thought—at least by their authors—to be a non-contentious change to the machinery of government.”¹⁵⁶ Recent case law from the European Court of Human Rights had raised questions about separation of powers within Britain, and the government sought to clarify institutional relationships to forestall any detrimental litigation.¹⁵⁷ As with other constitutional reforms, the main argument was one of modernization: in this case, to ensure a robust and transparent separation of powers and an independent judiciary.¹⁵⁸ No one position better encapsulated the confusing overlap of power and responsibility than the Lord Chancellor’s office. The Lord Chancellor was at once the presiding officer of the House of Lords, the head of the judicial branch, and in government a member of the Cabinet. This “holy trinity . . . could not go on.”¹⁵⁹ And by the early twenty-first century,¹⁶⁰ the position of the Appellate Committee *in* the House of Lords suggested that the tribunal might not be truly independent,¹⁶¹ as required by Article 6 of the European Convention on Human Rights.¹⁶²

¹⁵⁴ See BANNER & DEANE, *supra* note 147, at 7, 15, 19–20.

¹⁵⁵ See House of Lords Constitutional Reform Bill Committee, Minutes of Evidence, Supplementary Response of Lord Hobhouse of Woodborough, Nov. 7, 2003, available at <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/4042208.htm> (“I am in principle in favour of setting up a United Kingdom Supreme Court and therefore would support a properly structured and implemented proposal. However the Consultation Paper does not contain such a proposal.”); see also STEYN, *supra* note 119, at xx (Lord of Appeal in Ordinary) (“[T]he obvious and sensible decision to create a Supreme Court was handled in a singularly inept way and caused widespread resentment.”).

¹⁵⁶ MASTERMAN, *supra* note 2, at 219.

¹⁵⁷ The ECtHR case law was only one argument for constitutional change. Some observers suggest internal politics and power dynamics drove the initial push for change. See Le Sueur, *supra* note 148, at 67 (discussing relationship between David Blunkett (Home Secretary) and Lord Irvine (Lord Chancellor)).

¹⁵⁸ 657 PARL. DEB., H.L. (5th ser.) (2004) 926–27 (U.K.).

¹⁵⁹ *Inquiry on Judicial Appointments Process: Unrevised Transcript of Evidence Taken Before the House of Lords Select Committee on the Constitution* 1–2 (Evidence Sess. No. 4, Oct. 12, 2011).

¹⁶⁰ Concerns about the independence of the Appellate Committee of the House of Lords have a storied lineage. Walter Bagehot, in his canonical 1867 *The English Constitution*, decried the fact that the supreme court of the nation was housed in the upper house of Parliament, calling for “a great conspicuous tribunal, . . . not [one] hidden beneath the robes of a legislative assembly.” WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 159 (London, Chapman & Hall 1867).

¹⁶¹ See Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103, 116 (2009); see also ROBERT STEVENS, *THE ENGLISH JUDGES: THEIR ROLE IN THE CHANGING CONSTITUTION* 104–06 (rev. ed. 2005). Notwithstanding a strong convention against Law Lords voting on controversial legislation, see RICHARD CORNES, *REFORMING THE LORDS: THE ROLE OF THE LAW LORDS* (1999), <http://www.ucl.ac.uk/spp/publications/unit-publications/42.pdf>, in 2004 two Law Lords voted and spoke against the proposed Hunting Act, forcing 570

Notwithstanding a general and growing agreement that the British situation was anomalous in contemporary constitutional systems—as Bagehot said, no constitutional theorist would assign the judicial function to a second legislative chamber¹⁶³—the response to the Blair government’s proposals “illustrated quite conclusively that what was thought . . . to be a routine amendment . . . was in fact a series of changes of immense constitutional significance.”¹⁶⁴ A final bill was not passed until 2005, after months of negotiations and consultations.¹⁶⁵

The primary change wrought by the 2005 Constitutional Reform Act (Reform Act) was, as intended, its creation of an unequivocally independent judiciary.¹⁶⁶ The most dramatic shift was in the altered role of the Lord Chancellor: the position is now that of an executive minister, the Secretary of State for Justice,¹⁶⁷ and no longer comprises judicial or legislative functions.¹⁶⁸ In addition, the Act provided that the Appellate Committee would be removed from the House of Lords and reconstituted as a Supreme Court of the United Kingdom. The Supreme Court would function in most ways as the Appellate Committee had done, mirroring its jurisdictional remit. The only additional grant of power was over devolution issues; the Reform Act redistributed this power from the Privy Council to the new Supreme Court as a tidying-up exercise, removing the potential for conflict between the two institutions.¹⁶⁹

The Scottish Executive eventually supported the legislation,¹⁷⁰ but initially, proposals for “a ‘Supreme Court of the United Kingdom’ were

recusals in the subsequent challenges to the Act. See Hale, *supra* note 138, at 21. Lay peers have not voted in legal appeals since 1844. See Stevens, *supra* note 54, at 334.

¹⁶² Convention, *supra* note 66, art. 6(1).

¹⁶³ BAGEHOT, *supra* note 104, at 188.

¹⁶⁴ MASTERMAN, *supra* note 2, at 243.

¹⁶⁵ Le Sueur, *supra* note 148. Prior to the 2003 announcement, it appeared that the Blair government had failed to engage with the Scottish Executive on the issue, and that the Scottish judiciary and Scottish Law Lords were opposed to the proposals. In an interview on BBC Scotland shortly after the announcement, Lord Hope of Craighead, a Scottish Law Lord (now on the Supreme Court), “warned of the need to protect the integrity of the Scottish legal system and said that there were many as yet unanswered questions.” *Id.* at 69, 71.

¹⁶⁶ See MASTERMAN, *supra* note 2, at 31 (arguing that the Reform Act “may come to be seen as having cemented the status of judicial independence as a constitutional fundamental in the UK constitution”).

¹⁶⁷ His title was initially Secretary of State for Constitutional Affairs. The Secretary of State for Constitutional Affairs Order 2003, S.I. 2003/1887.

¹⁶⁸ Constitutional Reform Act, 2005, c. 4, §§ 2–22.

¹⁶⁹ *Id.* §§ 40–41. The impact of this jurisdictional shift will be discussed *infra* Part III. Other scholars have argued, in more general terms, that this “concentration” of power has been a factor in the development of the new Supreme Court as a constitutional court. See Aurélie Duffy-Meunier, *La Cour suprême au Royaume-Uni après le Constitutional Reform Act 2005: une juridiction hors norme*, 64 REVUE INTERNATIONALE DE DROIT COMPARÉ 681, 694 (2012).

¹⁷⁰ Le Sueur, *supra* note 148, at 81–82.

viewed with great suspicion and indeed hostility from Scotland.”¹⁷¹ There was fear the Court “might take on the role of policing the Scottish system on behalf of [the United Kingdom].”¹⁷² The Appellate Committee of the House of Lords had a contested historical jurisdiction over civil appeals from Scotland; but it had *no* jurisdiction over criminal appeals from the High Court of Justiciary in Scotland. A major concern of the Scottish judges was the integrity of the separate Scottish legal system; assurances were sought, and given, that the creation of the Supreme Court would not alter the Scottish system.¹⁷³ Neither the Scottish Executive nor the Blair government analyzed whether these assurances would be compatible with the Court’s new jurisdiction over devolution issues.

To provide continuity, the Lords of Appeal in Ordinary—the Law Lords—became the initial twelve Supreme Court Justices,¹⁷⁴ and in October 2009, the Supreme Court opened the doors to its new home in the renovated Middlesex Guildhall.¹⁷⁵ By turning the court of last resort from a committee of a legislative branch into a Supreme Court, and housing it in its own building across Parliament Square, the Act provided a visual and physical demonstration of a functional separation.¹⁷⁶ The architect that renovated the Court’s new home suggested that “[i]t is hoped that the front door of the Supreme Court might, in time, achieve the same kind of instant public recognition” as 10 Downing Street.¹⁷⁷ But others recognized that a higher profile may bring unwanted attention; as Lady Hale said, “[T]he more we are the new institution, and not the sort of old cozy protected institution in the House of Lords, I can see the more we’re going to be under fire for the things that we do.”¹⁷⁸

* * *

Each individual reform reflects the contested nature of British constitutionalism. The HRA both strengthens the judiciary and remains

¹⁷¹ C.M.G. Himsworth, *Devolution and Its Jurisdictional Asymmetries*, 70 M.L.R. 31, 38 (2007).

¹⁷² *Id.* at 39.

¹⁷³ *See id.* at 38 (“The absence of an appeal on criminal matters is viewed as an issue of high principle.”).

¹⁷⁴ Constitutional Reform Act, 2005, c. 4, §§ 23–24.

¹⁷⁵ Hugh Feilden, *The Design of the Supreme Court of the United Kingdom*, in THE SUPREME COURT OF THE UNITED KINGDOM, *supra* note 138, at 138, 140, 161 (architect).

¹⁷⁶ Louis E. Wolcher, *A Philosophical Investigation into Methods of Constitutional Interpretation in the United States and the United Kingdom*, 13 VA. J. SOC. POL’Y & L. 239, 276 (2006) (“[The] physical separation is not just cosmetic, however—it also symbolizes a deeper functional separation.”).

¹⁷⁷ Feilden, *supra* note 175, at 150.

¹⁷⁸ *Justice Ginsburg and Baroness Hale: The British and United States Legal Systems*, SUPREME COURT FELLOWS PROGRAM ALUMNI ASSOC’N & GEORGETOWN LAW SUPREME COURT INST. 1:23:04–:16 (Jan. 24, 2008), available at <http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=473>.

faithful, as a formal matter, to parliamentary sovereignty. Devolution likewise protects the ultimate authority of the Westminster Parliament, but the Scottish Parliament, in particular, has a separate source of popular support, challenging parliamentary sovereignty. Yet political tensions between legislatures do not reflect external limitations on Westminster that can be enforced by courts. Finally, the creation of a new Supreme Court may bring focus and attention to the judicial branch, but it is unclear that the Court will choose to act at the outer limits of its authority. If these reforms serve “to extend the judicial role into spheres more frequently associated with the elected branches of government and to enhance the institutional separation of the judges from the executive and legislative branches,”¹⁷⁹ what then are their *interactive* effects? Will such interaction “make the cumulative impact [of the reforms] greater?”¹⁸⁰ In order to shed new light onto this constitutional debate, Part III will situate these individual reforms in a broader and connected framework—that of multilevel governance and theories of federalism.

III. MULTILEVEL GOVERNANCE AND LEGAL CONSTITUTIONALISM: REFORM IN CONTEXT

The individual constitutional reforms discussed in Part II are embedded in a broader system of multilevel governance.¹⁸¹ In this schema, the United Kingdom and its national institutions are sandwiched between devolved legislatures and supranational courts. There are, therefore, multiple relationships that affect the constitutional understanding: that between the Westminster Parliament and the European Court of Human Rights,¹⁸² between Westminster and Holyrood, between Holyrood and the Supreme Court, between the Scottish courts and the Supreme Court, and of course, between the Supreme Court and Westminster itself. This final relationship drives the meta-understanding of British constitutionalism—as political or legal constitutionalism—and this Part seeks to understand how that dynamic is affected by the other links in this multilevel system.

The multiple levels of governance in the British system create a kind of quasi-federalism. And the new Supreme Court serves as a quasi-federal

¹⁷⁹ MASTERMAN, *supra* note 2, at 32.

¹⁸⁰ Hazell, *supra* note 4, at 86 (“These are new pillars of our constitution. They will in turn release a political and legal dynamic which is much greater than we can currently foresee. In part this is because of interactive effects which will make the cumulative impact greater.”).

¹⁸¹ Cf. PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION, *supra* note 10, at 1; Nicholas Bamforth & Peter Leyland, *Public Law in a Multi-layered Constitution*, in PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION, *supra* note 10, at 3, 3 (discussing the British constitution as a “[m]ulti-[l]ayered” constitution).

¹⁸² Other relationships in this multilevel scheme include those with the institutions of the European Union institutions, such as between Westminster and the European Court of Justice, and between the European Court of Justice and the Supreme Court.

court.¹⁸³ Dicey, the great expositor of parliamentary sovereignty, was wary of federalism.¹⁸⁴ He equated it with “legalism” and worried that it would naturally lead to “the predominance of the judiciary in the constitution.”¹⁸⁵ Recent scholarship suggests that, at least in the United States, the federal system might have played an important role in the rise of judicial power.¹⁸⁶ Drawing on this range of scholarship, this Part will discuss two key aspects of federalist or multilevel systems that assist in cementing a court’s centrality: first, the prevalence of boundary disputes, and second, pressures for uniformity. In addition, political science literature sheds light on how judicial empowerment evolves through interbranch relationships and repeat decisions by political actors.

As this Part acknowledges, the Court’s actions and opportunities do not cohere in every respect with predictions of increased power.¹⁸⁷ But a richer, more nuanced understanding of the possibilities presented by the interactive effects of these reforms aids those legal constitutionalists who draw on these descriptive accounts for support. Furthermore, the judiciary must accrue a certain amount of institutional and political credibility before legal constitutionalists can realistically expect any decision limiting parliamentary power to be accepted.¹⁸⁸ And the evidence suggests the British judiciary is very much on the rise.

¹⁸³ The Court’s new crest includes symbols of the four “nations” within the United Kingdom. *Supreme Court Emblem*, SUP. CT., <http://www.supremecourt.uk/visiting/new-artwork.html#emblem> (last visited Mar. 23, 2014). At the Court’s dedication, the Poet Laureate read these lines: “New structures but an old foundation stone: / The mind of Justice still at liberty / Four nations separate but linked as one: / The light of reason falling equally.” Andrew Motion, Poet Laureate, 1999–2009, *Lines for the Supreme Court*, in *THE SUPREME COURT OF THE UNITED KINGDOM*, *supra* note 138, at 9, 9.

¹⁸⁴ See DICEY, *supra* note 132, at viii.

¹⁸⁵ DICEY, *supra* note 25, at 170.

¹⁸⁶ See, e.g., Jenna Bednar, Response, *The Dialogic Theory of Judicial Review: A New Social Science Research Agenda*, 78 GEO. WASH. L. REV. 1178, 1183–84 (2010) (“Perhaps federalism can be credited as a catalyst establishing the Court’s legitimacy, attracting public attention, seeding public confidence in it, and fostering public acceptance of judicial review.”).

¹⁸⁷ The appointment of Jonathan Sumption as a Justice of the Court has been suggested by some as evidence of a coming retrenchment or retreat of judicial power. See Tomkins, *supra* note 19, at 2277 & n.8. Sumption delivered the F.A. Mann Lecture in 2011, entitled *Judicial and Political Decision-Making: The Uncertain Boundary*, in which he raised questions about the defensibility of “judicial resolution of inherently political issues,” presumably including questions of rights definition and recognition. See Jonathan Sumption, Q.C., F.A. Mann Lecture, *Judicial and Political Decision-Making: The Uncertain Boundary* 19 (Nov. 8, 2011) (transcript available at http://www.legalweek.com/digital_assets/3704/MANNLECTURE_final.pdf).

¹⁸⁸ Note, in this regard, that the U.S. Supreme Court first established the Court’s power of judicial review over Acts of Congress in 1803, see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), but this horizontal judicial review was contentious and debated well into the twentieth century. See CHARLES GROVE HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 1–19 (2d ed. rev. ed. 1959).

A. Boundary Disputes

Dividing or sharing power is often an exercise in line drawing: the principle of the distribution of powers requires determining when bounded limits are breached. And “any division of legislative power will raise certain fundamental issues which must be resolved by the courts and which will shape the entire nature of that division of authority.”¹⁸⁹ Whether power is devolved over time or divided ab initio, “the judicial task of determining legislative competence is, in conceptual terms, essentially the same in both. Judges must identify the subject matter of the impugned statute, and then determine whether it falls within or outside the subject matters over which the legislature has authority.”¹⁹⁰ The central court thus takes on the role of an impartial arbiter: “independent of both the [national] and the [subnational] governments . . . stand[ing] sublimely above both.”¹⁹¹ Under the terms of the devolutionary settlement in the United Kingdom, the Supreme Court stands only above the devolved legislatures, not Parliament—but it has jurisdiction to monitor the division of competences enacted in the devolution acts.¹⁹² How the Court chooses to exercise this power will affect its own position in the constitutional order and the ways that order can be considered to reflect a version of legal constitutionalism.

Boundary disputes also occur in other contexts, beyond the realm of divided legislative powers. When there are multiple levels of protection over the same set of rights, for example, conflicting interpretations may raise questions about who holds the ultimate authority to determine the content and scope of a particular right.¹⁹³ The relationship between the Westminster Parliament and the European Court of Human Rights (ECtHR) demonstrates this tension in their face-off about rights definition and protection. In this context, power may accrue to the institution with the first-mover advantage, or that with sufficient enforcement mechanisms to impose its will. Given its institutional position as a court in dialogue with

¹⁸⁹ Craig & Walters, *supra* note 112, at 289.

¹⁹⁰ *Id.* at 288.

¹⁹¹ IVO D. DUCHACEK, *COMPARATIVE FEDERALISM: THE TERRITORIAL DIMENSION OF POLITICS* 256 (1970). On the need for a federal system to incorporate some sort of impartial agency, see *id.* at 207–08. See also S. RUFUS DAVIS, *THE FEDERAL PRINCIPLE: A JOURNEY THROUGH TIME IN QUEST OF A MEANING* 122 (1978); URSULA K. HICKS, *FEDERALISM: FAILURE AND SUCCESS* 7 (1978); WILLIAM S. LIVINGSTON, *FEDERALISM AND CONSTITUTIONAL CHANGE* 10–11 (1956); P.-J. PROUDHON, *THE PRINCIPLE OF FEDERATION* 41 (Richard Vernon trans., 1979) (1863); GEOFFREY SAWER, *MODERN FEDERALISM* 1–2 (new ed. 1976); WHEARE, *supra* note 134, at 58–59.

¹⁹² The devolutionary acts gave power to determine “devolutionary issues” to the judiciary (in the form of the Judicial Committee of the Privy Council), and the Constitutional Reform Act shifted this jurisdiction to the new U.K. Supreme Court upon its creation. See *supra* Parts I.B–II.C.

¹⁹³ This concept raises issues similar to the *Kompetenz-Kompetenz* debate—the challenge of determining where the ultimate authority in a judicial system lies. Cf. Erin Delaney, *Managing in a Federal System Without an ‘Ultimate Arbiter’*: *Kompetenz-Kompetenz in the EU and the Ante-bellum United States*, 15 REGIONAL & FED. STUD. 225 (2005).

the ECtHR,¹⁹⁴ the Supreme Court may have some institutional advantages over Parliament in this dynamic, and by protecting national interests, the Court may promote its own institutional position within the constitutional system.

This section treats each of the above issues in turn, assessing the Court's actions to determine the impact of these boundary disputes on the evolving relationship between the judiciary and Parliament. In other words, how might the Court's vertical relationships—with Scotland below and the European Court of Human Rights above—affect its horizontal relationship with Parliament? This section argues that the Court's position within this multilevel framework provides opportunities for accruing institutional power, even at the expense of Parliament.

1. The United Kingdom v. Scotland: Devolution Issues.—The hierarchical relationship between the Supreme Court and Scotland engages a number of potential theories, drawn from social science literature, about the possible effects of that dynamic on the relationship between the Court and the Westminster Parliament. In this subsection, the focus is on the division of competences provided for in the Scotland Act (1998) and those cases before the Court that raise questions of statutory interpretation. Prior to the creation of the Court in 2009, the Judicial Committee of the Privy Council had heard only six cases related to the legislative competence of the Scottish Parliament, all of which challenged the relevant acts of that body on the basis of incompatibility with the Convention.¹⁹⁵ The ability to attack Scottish legislative or executive action on human rights grounds raises questions about the uniformity of national rights, an issue which will be addressed further below. Regarding clear division-of-competences cases raising questions of statutory interpretation, the Court has heard only three cases raising non-Convention and non-European Union law-based devolution issues—two of the cases related to Scotland, and one to Wales.¹⁹⁶ Two theories connect these vertical cases to the horizontal relationship between the Court and Parliament, and they will be treated in turn: first, concurrent legislative authority and second, doctrinal entanglement.

¹⁹⁴ See *supra* notes 91–92 and accompanying text.

¹⁹⁵ See *Procurator Fiscal v. Brown*, [2000] UKPC D3, [2003] 1 A.C. 681 (appeal taken from Scot.); *HM Advocate v. McIntosh*, [2001] UKPC D1, [2003] 1 A.C. 1078 (appeal taken from Scot.); *McLean v. Procurator Fiscal*, [2001] UKPC D3, [2001] 1 W.L.R. 2425 (appeal taken from Scot.); *Anderson v. The Scottish Ministers*, [2001] UKPC D5, [2003] 2 A.C. 602 (appeal taken from Scot.); *Flynn v. HM Advocate*, [2004] UKPC D1, [2004] S.C. (P.C.) 1 (appeal taken from Scot.); *DS v. HM Advocate*, [2007] UKPC D1, [2007] S.C. (P.C.) 1 (appeal taken from Scot.).

¹⁹⁶ *Martin v. HM Advocate*, [2010] UKSC 10, [2010] S.C. 40 (appeal taken from Scot.); *Axa Gen. Ins. Ltd. v. Lord Advocate*, [2011] UKSC 46, [2012] 1 A.C. 868 (appeal taken from Scot.); *Local Gov't Byelaws (Wales) Bill 2012—Reference by the Attorney Gen. for Eng. & Wales*, [2012] UKSC 53, *Attorney Gen. v. Nat'l Assembly for Wales Comm'n* [2013] 1 A.C. 792.

a. Concurrent legislative authority.—The first theory suggests that where there is concurrent legislative authority in a federal or quasi-federal system, there will be much litigation and tension, and a court may be able to enhance the powers of the subnational legislature (here, Holyrood) at the expense of the national legislature (here, Westminster).¹⁹⁷ In certain circumstances, such a decision to empower the subnational legislature might serve to increase the power and relevance of the court in its horizontal relationships. For example, suppose the Supreme Court interpreted the Scotland Act to grant Holyrood power to legislate on an issue of particular political salience to Scotland. The Westminster Parliament might disagree with such a reading, but nevertheless choose to acquiesce to the Supreme Court's allocation of competences for reasons of political expediency.¹⁹⁸ Such acquiescence can, over time, shift into a powerful convention supporting judicial power.¹⁹⁹ Thus, due to judicial decisions empowering the subnational legislature, power may ebb from the national legislature and flow to the central court.

The first case to reach the Supreme Court that raised a non-Convention-related devolution issue was not one of pressing political salience; nevertheless, it introduced a critical set of concerns and approaches to the question of Scottish power, including an oblique reference to the theory of concurrent legislative authority. In *Martin v. HM Advocate*, decided in 2010, the Supreme Court identified a question of overlapping competences. *Martin* presented a challenge to the Criminal Proceedings Act (Scotland) 2007, which increased the sentence for unlicensed driving that the Westminster Parliament had set in its Road Traffic Offenders Act of 1988.²⁰⁰ The Scottish High Court of Justiciary determined in a previous case, *Logan v. Harrower*, that the Scottish Parliament was within its legislative competence to increase this sentence.²⁰¹ If the Supreme Court concluded that the Scottish Act related to a matter reserved to Westminster, the Act would be considered ultra vires and void.

The Court split three to two—upholding the Act as within the devolved competence of the Scottish Parliament but relying on distinct

¹⁹⁷ See Craig & Walters, *supra* note 112, at 299–302 (discussing Canada and Australia).

¹⁹⁸ BOGDANOR, *supra* note 7, at 115 (“Were the Supreme Court to rule, in a particular dispute, that the Scottish Parliament was acting *intra vires*, it would be difficult, in practice, for Westminster to override it either by using its sovereignty to legislate for Scottish domestic affairs, or by altering the distribution of powers. If it did, Parliament would appear to be flouting the judgment of a court on an issue on which Scottish national sentiment might well be engaged.”).

¹⁹⁹ Cf. WHITTINGTON, *supra* note 12, *passim*.

²⁰⁰ *Martin*, [2010] UKSC at [6].

²⁰¹ *Id.* at [4] (Lord Hope) (citation omitted) (“*Logan v. Harrower* was the first case that brought the extent of the legislative competence of the Scottish Parliament under judicial scrutiny on grounds other than compliance with Convention rights.”).

rationales to reach that conclusion.²⁰² In his opinion aligned with the majority (for which the Justices wrote seriatim), Lord Hope relied on the quasi-federal role of the Privy Council in its interactions with Commonwealth countries to inform the Supreme Court's approach to interpreting the Scotland Act. He recognized that "it was not possible, if a workable system was to be created, for reserved and devolved areas to be divided into precisely defined, watertight compartments. Some degree of overlap was inevitable This is a familiar phenomenon in the case of federal systems such as those in Canada and Australia" ²⁰³ Lord Hope went on to analyze the Judicial Committee of the Privy Council's efforts to disentangle competences in cases affecting India, Canada, and Australia— ascribing to the idea that whether an Act of the Scottish Parliament relates to a power reserved to Westminster should be informed by the Act's purpose.²⁰⁴ The Canadian and Australian systems are key examples of the concurrent competence theory, but the lack of a unified methodology undermines the decision's potential to serve as a model for future division-of-competences cases. And Lord Walker, another member of the majority, expressly took a different approach. Lord Walker described the interpretive project as "different from defining the division of legislative power between one federal legislature and several provincial or state legislatures (as in Canada or Australia . . .)," because "Parliament established the Scottish Parliament and the Scottish Executive and undertook the challenging task of defining the legislative competence of the Scottish Parliament, while itself continuing as the sovereign legislature of the United Kingdom."²⁰⁵

Martin was the new Court's first opportunity to discuss the division of competences, and it explained why so few cases had arisen. In the Court's view—and contrary to conventional federal theory that tensions over power allocation engender high levels of litigation—two key elements of the British system kept issues from coming to the Court. First, until May 2007, there was "harmony" between governments at Westminster and Holyrood—in other words, both governments were Labour Party governments.²⁰⁶ Second, there had been ample use of legislative consent motions,²⁰⁷ the procedural instantiation of the Sewel Convention, allowing the Scottish Parliament to register its consent (or dissent) on a proposed

²⁰² *Id.*

²⁰³ *Id.* at [11] (Lord Hope).

²⁰⁴ *Id.* at [11]–[18].

²⁰⁵ *Id.* at [44] (Lord Walker).

²⁰⁶ *Id.* at [4] (Lord Hope).

²⁰⁷ On the Sewel Convention, see *supra* note 117. See also *Sewel Convention Background*, SCOTTISH GOV'T, <http://www.scotland.gov.uk/About/Government/Sewel/Background> (last visited Mar. 23, 2014); *The Sewel Convention: Key Features*, SCOTTISH GOV'T, <http://www.scotland.gov.uk/About/Government/Sewel/KeyFacts> (last visited Mar. 23, 2014).

action of Westminster affecting Scottish interests.²⁰⁸ As the *Martin* case demonstrates, these elements of the *political* settlement on devolution have begun to break down. Political tensions between Holyrood and Westminster have increased since the 2007 elections in Scotland: the Scottish National Party, advocating Scottish independence, became the largest party in the Scottish Parliament after the 2007 elections, and the pressure for a referendum on Scottish independence is the most obvious example of diverging political interests between the leaders at Holyrood and those at Westminster.²⁰⁹

The most recent indication that the number of pure division-of-competences cases may be increasing comes from Wales. The Welsh Assembly's power was expanded in 2006, and the Assembly may now pass primary legislation in a number of areas.²¹⁰ The very first bill passed by the Welsh Assembly under its expanded power—the Local Government Byelaws (Wales) Bill (2012)—was challenged as outside the Assembly's legislative competence by the Attorney General.²¹¹ This challenge raised express questions of concurrent power, and the Court found the Bill to be within the Welsh Assembly's power to enact. Although the U.K. government brought suit, there was little interest in the case in the Westminster Parliament: the local government issues at stake did not present a threat.²¹² It remains to be seen if litigation, rather than political

²⁰⁸ According to the Devolution Guidance, consent is “needed” in areas specifically devolved to Scotland, but the entire mechanism is political, and not a legally enforceable provision. For a list of the many consent motions considered by the Scottish Parliament, see *Sewel Convention—Legislative Consent Motions*, SCOTTISH GOV'T, <http://www.scotland.gov.uk/About/Government/Sewel> (last visited Mar. 23, 2014).

²⁰⁹ See *supra* note 131 and accompanying text. Patrick Wintour, *SNP Wins Historic Victory*, GUARDIAN (May 4, 2007, 2:37 PM), <http://www.theguardian.com/uk/2007/may/04/scotland.devolution>.

²¹⁰ The Welsh Assembly does not yet have as broad a scope of power as that granted to the Scottish Parliament, but its ability to pass primary legislation is an important step. Proposals are being discussed to grant the Assembly further power, including taxing powers, through the ongoing commission on devolution in Wales. See COMMISSION ON DEVOLUTION IN WALES, <http://commissionondevolutioninwales.independent.gov.uk> (last visited Mar. 23, 2014).

²¹¹ Local Gov't Byelaws (Wales) Bill 2012—Reference by the Attorney Gen. for Eng. & Wales, [2012] UKSC 53, [73], Attorney Gen. v. Nat'l Assembly for Wales Comm'n, [2013] 1 A.C. 792, [73] (Lord Hope).

²¹² The U.K. government referred the Bill to the Supreme Court in late July 2012—during Parliamentary recess. See *Attorney General in Court Challenge to First Welsh Bill*, BBC NEWS (July 31, 2012, 5:10 AM), <http://www.bbc.co.uk/news/uk-wales-politics-19055404>. The first discussion of this decision in the House of Commons was on October 17, 2012, at which point the Secretary of State for Wales explained that “[t]he reference . . . of the first Welsh Bill . . . to the Supreme Court should not be regarded as disrespectful or hostile in any sense. It is simply an administrative procedure to clear up the issue of competence and that is it.” 551 PARL. DEB., H.C. (6th ser.) (2012) 303–04 (U.K.) (David Jones). The only other discussion of the Bill occurred recently, when the costs of bringing the case to the Court (£62,500) were published. See 568 PARL. DEB., H.C. (6th ser.) (2013) 707 (U.K.); Letter from Rt. Hon. David Jones, Sec'y of State for Wales, to David T.C. Davies, Chair, Welsh Affairs Comm., House of Commons (Oct. 8, 2013), www.parliament.uk/documents/commons-committees/welsh-affairs/2013_10_08.pdf?docid=1568185! (concerning the Local Government Byelaws (Wales) Bill).

negotiation, will become the more dominant approach to testing the boundary lines among these quasi-federalist institutions. If it does, and if the Court continues to uphold the power of the devolved legislatures, there may yet be an occasion, in an issue of high political salience, to test Westminster's resolve in the face of a contrary position by the Court and a subnational legislature.

b. Doctrinal entanglement.—The second federalism-based theory of empowerment rests on the concept of doctrinal elaboration. In some areas of law, it can be difficult to maintain a principled distinction between the powers of the national and subnational levels to burden rights. If, for example, one has a protected individual right to economic liberty, on what grounds can the national legislature, but not the subnational legislatures, burden that right?²¹³ A court's decision to articulate doctrine to limit the subnational legislature may in turn entangle the national legislature.²¹⁴ The potential for such enmeshment exists in the British context: in *AXA General Insurance Ltd. v. HM Lord Advocate*,²¹⁵ the Court expressly addressed an important matter of judicial power vis-à-vis Scotland in terms broad enough to have ramifications on the Court's horizontal relationship with Westminster.

AXA dealt with the ongoing challenges posed by asbestos litigation in the United Kingdom. One major issue in all asbestos litigation is causation: the connection between pleural plaques or pleural thickening in the lungs and the disease asbestosis. In 2008, before the creation of the Supreme Court, the Law Lords decided *Rothwell v. Chemical & Insulating Co.*, in which, as a matter of English and Welsh law, they concluded that the mere presence of asymptomatic pleural plaques or pleural thickening “did not constitute an injury which was capable of giving rise to a claim for damages.”²¹⁶ The decision was not binding on the Scottish courts, but “[i]t was anticipated that . . . it would almost certainly be followed in Scotland as there is no material difference between the law of England and Wales and Scots law on this branch of the law.”²¹⁷ After the decision, the Westminster Parliament declined to legislate on the issue.²¹⁸ By virtue of *Rothwell*, insurance companies for the asbestos industry and related companies were insulated from these types of damages claims.

²¹³ See Friedman & Delaney, *supra* note 12, at 1166–72 (discussing the liberty right to contract and how its elaboration in the subnational context weakened the arguments against applying the right as a limitation to government action in the national context).

²¹⁴ See *id.*

²¹⁵ [2011] UKSC 46, [2012] 1 A.C. 868 (appeal taken from Scot.).

²¹⁶ *Id.* at [2] (Lord Hope) (discussing *Rothwell*, [2007] UKHL 39, [2008] 1 A.C. 281 (appeal taken from Eng.)).

²¹⁷ *AXA*, [2011] UKSC at [2] (Lord Hope).

²¹⁸ *Id.* at [14].

One year after *Rothwell*, the Scottish Parliament passed the Damages (Asbestos-Related Conditions) (Scotland) Act.²¹⁹ In direct contradiction to the Law Lords, the Act redefined the conditions that “shall constitute, and shall be treated as always having constituted, actionable harm” in asbestos cases to include these asymptomatic conditions.²²⁰ Exposed to massive risk, a number of major insurance companies sought a declaration that the 2009 Act was unlawful. The ensuing case, *AXA*, presented critical questions of devolved power and included respondents from Scotland and the U.K. government, as well as intervenors from Northern Ireland and Wales.²²¹

In *AXA*, the appellants challenged the Damages Act as outside the competence of the Scottish Parliament arguing, inter alia, that “it is open to judicial review on common law grounds as an unreasonable, irrational and arbitrary exercise of the legislative authority conferred by the Scotland Act 1998.”²²² Though ultimately finding the Act to be within the Scottish Parliament’s competence, Lord Hope recognized that:

[T]he question as to whether Acts of the Scottish Parliament . . . are amenable to judicial review, and if so on what grounds, is a matter of very great constitutional importance. It goes to the root of the relationship between the democratically elected legislatures and the judiciary. At issue is the part which the rule of law itself has to play in setting the boundaries of this relationship.²²³

Lord Hope first addressed whether the Scottish statute was amenable to judicial review on grounds other than those provided for in the Scotland Act 1998 itself. In doing so, he reaffirmed the Scottish Parliament’s place “as a self-standing democratically elected legislature” but noted, “it does not enjoy the sovereignty of the Crown in Parliament that . . . is the bedrock of the British constitution.”²²⁴ Because the Scottish Parliament is a legislature of devolved powers,²²⁵ “the rule of law does not have to compete with the principle of sovereignty.”²²⁶ The task of assessing the possibility of judicial review under the common law is therefore made “much easier.”²²⁷ Lord Hope drew on Lord Hailsham’s arguments in *The Dilemma of Democracy* about the potential danger to the rule of law of a powerful

²¹⁹ Damages (Asbestos-Related Conditions) (Scotland) Act, 2009, (A.S.P. 4); see also *AXA*, [2011] UKSC at [1] (describing insurance companies’ challenge to this Act).

²²⁰ *AXA*, [2011] UKSC at [1]–[2] (Lord Hope) (citing Damages (Asbestos-Related Conditions) (Scotland) Act, 2009, (A.S.P. 4)). The Act is reproduced in relevant parts in *AXA*, [2011] UKSC at [13] (Lord Hope).

²²¹ *AXA*, [2011] UKSC at [4] (Lord Hope).

²²² *Id.* at [17] (Lord Hope).

²²³ *Id.* at [42] (Lord Hope).

²²⁴ *Id.* at [46].

²²⁵ See *supra* Part II.B.

²²⁶ *AXA*, [2011] UKSC at [51].

²²⁷ *Id.*

government supported by a large majority in parliament.²²⁸ He noted that the Scottish government is supported by a majority that dominates the single-chamber Parliament and the various committees that scrutinize bills. He found it

not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.²²⁹

Lord Hope was quick to distinguish the Scottish Parliament from Westminster based on Holyrood's lack of sovereign power, and he asserted that the Court's experience with the U.K. Parliament shed little light on how it should approach the Scottish question. He noted "as a challenge to primary legislation at common law was simply impossible while the only legislature was the sovereign Parliament of the United Kingdom at Westminster, we are in this case in uncharted territory."²³⁰ Lord Hope ultimately reserved the question about "the relationship between the rule of law and the sovereignty of the United Kingdom Parliament,"²³¹ but his justifications for review over the Scottish Parliament will be difficult to limit to the devolutionary context.

The prudential and jurisprudential arguments presented in favor of judicial review and the dangers of unchecked democracy are as applicable to Westminster as to Holyrood. Dramatic government majorities in Westminster might present similar threats, and Lord Hope acknowledged that these issues had been raised in the 2006 case *Jackson v. HM Attorney General*.²³² There, Lord Steyn had noted a steady increase in governmental power since Lord Hailsham first proposed the dilemma, and Steyn raised the possibility that "the Supreme Court might have to consider whether judicial review or the ordinary role of the courts was a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons could not abolish."²³³

That the Supreme Court was willing to establish a principle of judicial review over the Scottish Parliament grounded in the rule of law and rights protection does not mean that it will apply the same rule to Westminster. However, it is possible to observe in this case the elements that might make possible the transfer of the Court's vertical power over Scotland to

²²⁸ *Id.* at [50] (citing LORD HAILSHAM, *THE DILEMMA OF DEMOCRACY* 126 (1978)).

²²⁹ *AXA*, [2011] UKSC at [51] (Lord Hope).

²³⁰ *Id.* at [48].

²³¹ *Id.* at [51].

²³² *See id.* at [50] (citing *Jackson v. HM Attorney Gen.*, [2005] UKHL 56, R (Jackson) v. Attorney Gen., [2006] 1 A.C. 262 [102]).

²³³ *Id.* (citing *Jackson*, [2005] UKHL at [120]).

horizontal judicial power usable against Westminster: a theoretically grounded justification for action that does not easily admit of distinctions between the two legislative institutions based on federalism grounds. Will the Supreme Court find occasion to make a grander statement? Or choose to precipitate a possible confrontation with Westminster? It may be unlikely, but should the Court contemplate such a move, the doctrinal support may come from *AXA* and the vertical definition of judicial power.

2. *The United Kingdom v. Europe: Fundamental Rights.*—Unlike the devolutionary setting, in the context of the European rights system, structured around the European Convention on Human Rights, Westminster has no competing parliament—rather, it (and the government in office) compete with a higher court. The ECtHR has interpretive authority over the Convention, and if it finds the United Kingdom to be in breach of the Convention, the United Kingdom must either comply with the ECtHR’s judgment (often by passing new legislation) or be subject to ongoing oversight by the Council of Europe.²³⁴ The Westminster Parliament thus has limited ability to contradict the ECtHR or to proffer an alternative approach to rights definition. The government and parliamentarians are often put into a politically untenable position, exacerbated by the growing frustration with Europe and European “dictates.”²³⁵ They have no ability to negotiate or recalibrate the rights definition provided by the ECtHR, leaving them with an all-or-nothing political decision: either they remain in breach of the

²³⁴ Convention for the Protection of Human Rights and Fundamental Freedoms arts. 32, 46, Nov. 4, 1950, as amended by Protocols Nos. 11 and 14, as supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13, www.echr.coe.int/Documents/Convention_ENG.pdf; STEVEN GREER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS 155–65 (2006) (discussing oversight procedures of the Committee of Ministers at the Council of Europe).

²³⁵ Frustration with Strasbourg has led politicians to advocate exiting the Convention system. See, e.g., Danny Nicol, *The Human Rights Act and the Politicians*, 24 LEGAL STUD. 451, 473 (2004) (discussing Michael Heseltine’s—then-Deputy Prime Minister—response to *McCann v. United Kingdom*). In 2011, a Commission on a Bill of Rights was established and charged with investigating the creation of the British Bill of Rights in response to controversial rulings from the ECtHR. See 1 COMM’N ON A BILL OF RIGHTS, A UK BILL OF RIGHTS? THE CHOICE BEFORE US 3, 5 (2012), <http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf>. The Commission was comprised of nine legal experts from various political parties, and consulted widely in formulating its opinions. Ultimately, the Commission was unable to reach a consensus and disbanded after submitting a final report on December 18, 2012. See *id.* at 28–33. Two Conservative members of the Commission recommended withdrawing from the European Convention on Human Rights while Liberal Democrats and Labour Party members opposed the creation of a U.K. Bill of Rights altogether and stressed the need for the United Kingdom to remain in the European Convention system. See Owen Bowcott, *UK Bill of Rights Commission Fails to Reach Consensus*, GUARDIAN (Dec. 18, 2012, 7:52 AM), <http://www.guardian.co.uk/law/2012/dec/18/uk-bill-of-rights-commission>. A Bill of Rights was never adopted. *The Commission on a Bill of Rights’ Report—A UK Bill of Rights?—The Choice Before Us*, JUSTICE (Dec. 18, 2012), <http://www.justice.gov.uk/news/press-releases/cbr/the-commission-on-a-bill-of-rights-report-a-uk-bill-of-rights-the-choice-before-us>.

Convention as interpreted by the ECtHR, or they pass conforming legislation that may be widely opposed by the electorate.²³⁶

The HRA inserts the U.K. Supreme Court between Parliament and the ECtHR, changing the dynamic of rights definition and demonstrating the importance and prominence of the Court's role. If devolution placed the U.K. Supreme Court at the apex of the quasi-federal system, the HRA has turned the Court into something more akin to a lower state court in a federal system—subject to review by a higher court (the ECtHR), but also

²³⁶ A recent example demonstrates how the nature of this judicial process strains the relationship between Parliament and the ECtHR. In 2005, the ECtHR found the United Kingdom in violation of the Convention due to its blanket denial of voting rights to prisoners; the ECtHR demanded that the United Kingdom take action to remedy the situation. See *Hirst v. United Kingdom* (No. 2), 2005-IX Eur. Ct. H.R. 187. In response, the British government initiated a public consultation on the question; no legislation was initiated. The Council of Europe's Committee of Ministers adopted a series of resolutions chiding the U.K. for failing to comply with the Court's decision. See ISOBEL WHITE, HOUSE OF COMMONS LIBRARY, PRISONERS' VOTING RIGHTS 21–22 (2014), www.parliament.uk/briefing-papers/sn01764.pdf. And the Court continued to issue rulings against the United Kingdom. See *Greens & M.T. v United Kingdom*, App. Nos. 60041/08 & 60054/08, 53 Eur. H.R. Rep. 710 (2011). In early 2011, the House of Commons voted, 234 to 22, in favor of maintaining the ban, 523 PARL. DEB., H.C. (6th ser.) (2011) 493–586 (U.K.), and in May 2012, the European Court gave Britain a final six-month extension in which to comply. WHITE, *supra*, at 40. Late in 2012, the Voting Eligibility (Prisoners) Draft Bill was introduced to address the incompatibility and a Joint Select Committee was appointed to conduct prelegislative analysis of the proposed bill. *Id.* at 44–45. Opinion polls, however, showed the British public to be strongly opposed to any change in the law. Not surprisingly, given the political sentiment on the issue, Prime Minister David Cameron has vocalized his distaste for the measures, even as his government proposes them. See Ashley Byrne, *UK Mulls Ruling over Prisoner Voting Rights*, DEUTSCHE WELLE (Jan. 24, 2013), <http://dw.de/p/17QID>. The Justice Secretary, in discussing the proposed legislation, has said that MPs could decide to “legislate contrary to fundamental principles of human rights,” but that there may be a “political cost.” See *MPs Can Force UK to Keep Ban on Prisoner Votes—Minister*, BBC NEWS (Nov. 22, 2012, 11:04 AM), <http://www.bbc.co.uk/news/uk-politics-20431995>. The Joint Select Committee recognized, should the U.K. fail to comply, that the potential liability could reach £3.5 million, see JOINT COMM. ON THE DRAFT VOTING ELIGIBILITY (PRISONERS) BILL, DRAFT VOTING ELIGIBILITY (PRISONERS) BILL, 2013–14, H.L. 103, H.C. 924, ¶ 103 (U.K.), www.publications.parliament.uk/pa/jt201314/jtselect/jtdraftvoting/103/103.pdf, and the obvious solution would be to leave the Convention system, see *id.* ¶ 107. Consistent with my argument above, it may be that the U.K. Supreme Court's ability to participate in these debates—even now, after the initial violation—may provide some benefits. In parallel to these events, two prisoners—Chester and McGeoch—brought suit in domestic U.K. courts challenging the ban on voting. These cases were heard by the U.K. Supreme Court in June 2013, and an opinion was issued in October 2013. *R (on the application of Chester) v. Sec'y of State for Justice & McGeoch v. Lord President of the Council & Another* (Scotland), [2013] UKSC 63. Chester's claim raised the Article 3 issues implicated by *Hirst*. In dismissing the cases, Lord Mance confronted the tension between the U.K. and the ECtHR, recognizing (though refusing to declare in this instance) that an incompatibility existed. *Id.* at [39]. Rather, Mance spent a considerable time demonstrating how a ban on Chester's ability to vote could be reconciled with the developing case law of the European Court, focusing on sentence length. *Id.* at [41]–[42]. In its final report on December 18, 2013, the Joint Select Committee reiterated these themes, and recommended limited changes to the current ban, allowing “prisoners serving sentences of 12 months or less . . . to vote in all UK parliamentary, local and European elections.” See JOINT COMMITTEE, *supra*, ¶¶ 236, 239. For a discussion of the tension between parliamentary sovereignty and judicial protection of rights in the context of prisoners' voting rights, see Janet L. Hiebert, *The Human Rights Act: Ambiguity About Parliamentary Sovereignty*, 14 GERMAN L.J. 2253 (2013).

responsible for articulating and protecting unique and distinct law. How might this new dynamic affect the relationship between the Supreme Court and Parliament itself? In comparative context, the history of the early United States demonstrates occasions of interbranch collaboration to promote central-level power at the expense of the individual states, and the political support given to the U.S. Supreme Court in such situations served to enhance its power and prestige.²³⁷ A British version of this story suggests that Parliament might look toward the new U.K. Supreme Court to mediate its relationship with the ECtHR. If so—and if the Court and Parliament do band together in defense of British preferences—will Parliament then find itself constrained by, or choose to acquiesce in, the Court’s decisions in other areas? Furthermore, might Parliament prefer to allow the Court to mediate the relationship with Europe?

There is some indication that the Blair government may have seen a benefit in allowing national courts to interpret the Convention through the HRA. In its advocacy for the HRA, a major tenet of the approach was to “bring rights home” by giving authority to British courts to articulate British rights.²³⁸ A court has certain institutional advantages over a legislature or executive in this context.²³⁹ First, a court has the ability to interact with the ECtHR *ex ante*, before a claim has been lodged with the ECtHR, whereas the British government can only defend the U.K.’s position during litigation, and Parliament can only respond *ex post*, after a decision by the ECtHR has been made. Prior to the HRA, British courts could not hear or opine on Convention-based claims. Now that such claims are available, a litigant exhausts her national remedies in British court prior to bringing a petition before the ECtHR.²⁴⁰ This gives a national court the opportunity to explain and distinguish the nature of the British practice at issue in the context of a reasoned judicial opinion—a form and manner that the ECtHR will both understand and be expected to address or take into account.²⁴¹

²³⁷ See Friedman & Delaney, *supra* note 12, at 1149–57 (discussing early growth of the vertical power of the Supreme Court due to the willingness of the President to support the Court against the states); cf. WHITTINGTON, *supra* note 12, at 9 (discussing acquiescence as contributing to the power of the Supreme Court, and noting that “[j]udicial supremacy itself rests on political foundations. The judiciary may assert its own supremacy over constitutional interpretation, but such claims ultimately must be supported by other political actors . . .”).

²³⁸ RIGHTS BROUGHT HOME, *supra* note 69, at 6 (“British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe.”).

²³⁹ Cf. CROWE, *supra* note 13, at 12 (footnote omitted) (noting political actors’ “recognition of performance benefits unique to judicial governance (the application of uniform and consistent rules across agencies or states, the information advantage in assessing the concrete effects of policy afforded by being an *ex post* mover)”).

²⁴⁰ See *supra* note 66 and accompanying text.

²⁴¹ Cf. Jeroen Schokkenbroek, *Judicial Review by the European Court of Human Rights: Constitutionalism at European Level*, in JUDICIAL CONTROL 153, 158 (Rob Bakker et al. eds., 1995) (noting influence of legal reasoning at the national level on the ECtHR).

Beyond the potential for judicial dialogue, political benefits might also accrue to Parliament by its allowing courts to take the lead on rights definition. In addition to the HRA's potential for protecting British interests, it also, and perhaps contradictorily, required British courts to take judgments of the ECtHR "into account" when defining rights.²⁴² What advantages to Parliament might this present? If the British courts do not distinguish rights as uniquely British, and seek instead to achieve conformity with European law, it may be through the articulation and development of the common law that these rights affect individuals. Politicians would not have to pass unpopular legislation in order to vindicate Convention rights. This exact type of legislative acquiescence and political calculation has been one driver in the increase of judicial power over time.²⁴³

Whether the Blair government or parliamentarians more generally saw clearly the potential political benefits from the adoption of the HRA, early signs suggest that the relationship is playing out to Parliament's advantage. This section will address two such indications: the Court has successfully negotiated with the ECtHR in order to define and protect rights in ways that better reflect British interests in the context of hearsay evidence; and in otherwise enforcing the Convention's protection of privacy, the Court has drawn political poison away from Parliament, a fact noted by at least one member of the House of Lords.²⁴⁴ It remains to be seen whether Parliament's reliance on the Court might in turn result in the Court's continued empowerment, towards gaining the "final say" over rights definition within Britain.

a. Protecting hearsay.—The question of inter-institutional dialogue is presented most clearly in the history of the 2011 case, *Al-Khawaja v. United Kingdom*.²⁴⁵ Mr. Imad Al-Khawaja, a British national, was arrested and "charged on two counts of indecent assault."²⁴⁶ One of his alleged victims gave a statement to police after the assault but committed suicide before trial. The trial judge admitted this alleged victim's statement to the jury—without the statement, the indictment on the first count of assault could not have been sustained. Ultimately, Al-Khawaja was convicted of "both counts of indecent assault."²⁴⁷ On appeal, Al-Khawaja

²⁴² Human Rights Act, 1998, c. 42, § 2 (U.K.).

²⁴³ See WHITTINGTON, *supra* note 12, *passim* (focusing on executive acquiescence); Paul Frymer, *Acting when Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–85*, 97 AM. POL. SCI. REV. 483, 495 (2003); Graber, *The Nonmajoritarian Difficulty*, *supra* note 12, at 41.

²⁴⁴ See 727 PARL. DEB., H.L. (5th ser.) (2011) 1493–94 (U.K.) (Lord Irvine).

²⁴⁵ App. Nos. 26766/05 & 22228/06, 54 Eur. H.R. Rep. 807, para. 147 (2011).

²⁴⁶ *Al-Khawaja & Tahery v. United Kingdom*, App. Nos. 26766/05 & 22228/06, 49 Eur. H.R. Rep. 1, 4 (2009).

²⁴⁷ *Id.* at 5.

challenged the evidentiary ruling admitting the statement, but his conviction was sustained. The Court of Appeal held that the trial judge's actions did not violate Article 6(1) or (3)(d) of the Convention protecting the right to a fair trial;²⁴⁸ in so concluding, the appeals court looked to ECtHR rulings suggesting that the question is "whether the proceedings as a whole, including the way the evidence was taken, were fair."²⁴⁹ Under that standard, the court determined that admission of the dead woman's testimony was acceptable. The Appellate Committee of the House of Lords, then the U.K.'s highest appeals court, declined review.²⁵⁰

Al-Khawaja petitioned the ECtHR, alleging a violation of the Convention. The Chamber of the ECtHR to which the case was assigned did not accept the United Kingdom's position that counterbalancing factors weighed in favor of admitting the testimony. The Chamber relied on a 2001 case, *Lucà v. Italy*,²⁵¹ in which the ECtHR held:

[W]here a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6.²⁵²

The United Kingdom appealed to the Grand Chamber of the ECtHR.²⁵³

Before the Grand Chamber was scheduled to hear the United Kingdom's appeal in *Al-Khawaja*, the U.K. Supreme Court decided *R v. Horncastle*.²⁵⁴ Horncastle was convicted of causing serious bodily harm, with intent, to Peter Rice. Rice made a statement to police about his injuries but died before trial from other causes. The statement was admitted at trial and was "to a decisive degree" the basis of the conviction.²⁵⁵ The Court of Appeal dismissed Horncastle's appeal, and he challenged his conviction at the Supreme Court on the ground that his trial violated Article 6 of the Convention.²⁵⁶

²⁴⁸ See Convention, *supra* note 66, art. 6(1) ("In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."); *id.* art. 6(3)(d) ("Everyone charged with a criminal offence has the following minimum rights: . . . to examine or have examined witnesses against him . . .").

²⁴⁹ *Al-Khawaja*, 49 Eur. H.R. Rep. at 5 (quoting *Doorson v. Netherlands*, 1996-II Eur. Ct. H.R. 446, 472).

²⁵⁰ *Id.* at 6.

²⁵¹ 2001-II Eur. Ct. H.R. 167, 178.

²⁵² *Id.* para. 40.

²⁵³ The Grand Chamber, a panel of seventeen judges, may agree to hear important cases (usually referred to it by a Chamber) *de novo*. Convention Protocol No. 11, *supra* note 66, arts. 27, 43.

²⁵⁴ [2009] UKSC 14, [2010] 2 A.C. 373 (appeal taken from Eng.).

²⁵⁵ *Id.* at [2].

²⁵⁶ *Id.* at [1].

The facts of Horncastle's case mirrored those of *Al-Khawaja's*, and Horncastle argued that the Supreme Court "should treat the judgment of the Chamber in *Al-Khawaja* as determinative of the success of [his] appeal[.]"²⁵⁷ In support of his position, he cited HRA Section 2, which requires courts "to take into account" decisions of the ECtHR.²⁵⁸ A unanimous U.K. Supreme Court declined to follow the European ruling. As President of the Court, Lord Phillips wrote:

There will . . . be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case.²⁵⁹

Lord Phillips then detailed the ways in which domestic law protected the right to a fair trial, beginning with an explanation of the English criminal process and including the traditional hearsay rule at common law and those exceptions enacted by Parliament "in the interests of justice."²⁶⁰ He went on to provide details of hearsay exceptions in other common law jurisdictions, including Canada, Australia, and New Zealand.²⁶¹ The decision then analyzed the ECtHR's jurisprudence prior to *Al-Khawaja*,²⁶² noting that it too had acknowledged certain exceptions "to the strict application of article 6(3)(d)."²⁶³ It concluded that the "jurisprudence of the Strasbourg Court in relation to article 6(3)(d) has developed largely in cases relating to civil law rather than common law jurisdictions and this is particularly true of the sole or decisive rule [relied upon in *Al-Khawaja*]."²⁶⁴ Furthermore, this development occurred "without full consideration of the safeguards against an unfair trial that exist under the common law procedure," or of the changes made to that law by Parliament expressly to ensure compliance with the Convention.²⁶⁵ In summation, Lord Phillips attested: "I have taken careful account of the Strasbourg jurisprudence. I hope that in due course the Strasbourg Court may also take account of the

²⁵⁷ *Id.* at [10].

²⁵⁸ *Id.*

²⁵⁹ *Id.* at [11].

²⁶⁰ *Id.* at [14], [28]–[37].

²⁶¹ *Id.* at [41] & Annexe 1.

²⁶² *Id.* at [63]–[86].

²⁶³ *Id.* at [64].

²⁶⁴ *Id.* at [107].

²⁶⁵ *Id.*

reasons that have led me not to apply the sole or decisive test in this case.”²⁶⁶

The Supreme Court announced its decision in December 2009; in the spring of 2010, the Grand Chamber heard the United Kingdom’s appeal in *Al-Khawaja*. In its opinion issued in December 2011, the Grand Chamber modified its view, concluding, “[W]here a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of [Article] 6(1).”²⁶⁷ Rather, it may be weighed against counterbalancing factors, “including measures that permit a fair and proper assessment of [its] reliability.”²⁶⁸ In applying this test to *Al-Khawaja*’s factual circumstances, the Grand Chamber concluded that “there were sufficient counterbalancing factors” preventing a breach of the Convention.²⁶⁹

The *Horncastle* litigation and the resulting inter-institutional dialogue were considered a great success of the Supreme Court. After the passage of the HRA, the Appellate Committee of the House of Lords also had some measure of success in interacting with the ECtHR,²⁷⁰ but that court’s actions did not garner as much attention.²⁷¹ It may be, therefore, that the

²⁶⁶ *Id.* at [108].

²⁶⁷ *Al-Khawaja v. United Kingdom*, App. Nos. 26766/05 & 22228/06, 54 Eur. H.R. Rep. 807, para. 147 (2011) (Tulkens, J.).

²⁶⁸ *Id.*

²⁶⁹ *Id.* para. 158. In the second (joined) case, the ECtHR found for the petitioner, requiring the United Kingdom to pay “€18,000 (£15,000) in costs and damages.” See Owen Bowcott, *European Court Backs British Judges over Hearsay Evidence*, GUARDIAN (Dec. 15, 2011, 7:46 AM), <http://www.guardian.co.uk/law/2011/dec/15/european-court-of-human-rights-ukcrime>.

²⁷⁰ The Lords’ decisions in *R v. Secretary of State for the Environment, Transport & the Regions ex parte Holding & Barnes PLC, Alconbury Developments Ltd & Legal & General Assurance Society Ltd*, [2001] UKHL 23, [2003] 2 A.C. 295 (“*Alconbury*”), and *Begum (FC) v. London Borough of Tower Hamlets*, [2003] UKHL 5, [2003] 2 A.C. 430, addressing issues of Convention Article 6 (right to a fair trial) were adopted in part by the European Court of Human Rights in *Tsfayo v. United Kingdom*, App. No. 60860/00, 48 Eur. H.R. Rep. 457, para. 45 (2009). See Sir Philip Sales, *Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine*, 2012 P.L. 253, 265; see also Brenda Hale, *Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?*, 12 HUM. RTS. L. REV. 65, 71–73 (2012) (discussing cases in which the Lords went “further than Strasbourg,” including *EM (Lebanon) v. Secretary of State for the Home Department*, [2008] UKHL 64, [2009] 1 A.C. 1198; *R v. Secretary of State for the Home Department ex parte Adam, Limbuela & Tesema*, [2005] UKHL 66, [2006] 1 A.C. 396; *In re P (Adoption: Unmarried Couple)*, [2008] UKHL 38, *In re G (Adoption: Unmarried Couple)*, [2009] 1 A.C. 173; and cases in which the House of Lords took a “British line” when addressing “interference with a qualified Convention right,” including *R (Countrywide Alliance) v. HM Attorney General*, [2007] UKHL 52, [2008] 1 A.C. 719).

²⁷¹ Another reason for the more limited focus on dialogic possibilities with the Appellate Committee of the House of Lords was that court’s decision in *R v. Special Adjudicator ex parte Ullah*, [2004] UKHL 26, [2004] 2 A.C. 323. That case introduced what has become known as the “mirror principle”: that domestic courts should “in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court.” *Id.* at [20] (Lord Bingham). This judicial approach has sustained criticism from Lord Irvine. See Lord Irvine of Lairg, *A British Interpretation of*

visibility of the stand-alone Supreme Court has had an effect on the public and parliamentary assessments of the Court's actions. After *Horncastle*, the legal director for Liberty, a U.K.-based human rights advocacy group, highlighted the "importance of [the ECtHR's] dialogue with our supreme court. . . . Without the Human Rights Act we'd have been left with the earlier inflexible judgment."²⁷² In addition, judges at both the national and European levels seemed pleased with the exchange. In his concurring opinion in *Al-Khawaja*, Sir Nicolas Bratza, a judge at the ECtHR, complimented the U.K. Supreme Court on "a good example" of judicial dialogue and suggested *Horncastle* influenced the decision to rehear *Al-Khawaja* in the Grand Chamber.²⁷³ British judges have indicated that they will continue to take this aggressive role. As Lord Phillips said, "Whenever Strasbourg gives a judgment which, when we have to consider its impact, leads us to believe that perhaps they haven't fully appreciated how things work in this country, we invite them to think again."²⁷⁴

b. The "European" right to privacy.—In contrast to *Horncastle*, in which the Supreme Court fought for a British understanding of the hearsay exception, the British courts have been more accepting of the European approach in the context of the right to privacy. In English law, privacy never achieved the status of a common law right.²⁷⁵ Protection rested instead on a mismatched set of common law doctrines, including, inter alia, libel, malicious falsehood, and trespass to the person.²⁷⁶ In 1991, after a particularly egregious case demonstrated the difficulty of protecting an individual's privacy against the efforts of scoop-seeking journalists,²⁷⁷ a number of senior judges called on Parliament to take action to remedy the situation.²⁷⁸ Eventually, and in large part unrelated to these demands,²⁷⁹

Convention Rights, 2012 P.L. 237; Tom Rainsbury, *Their Lordships' Timorous Souls*, 1 U.C. LONDON HUM. RTS. REV. 32, 45 (2008).

²⁷² Bowcott, *supra* note 269.

²⁷³ *Al-Khawaja v. United Kingdom*, App. Nos. 26766/05 & 22228/06, 54 Eur. H.R. Rep. 807, 862, para. 2 (2012) (Bratza, J., concurring).

²⁷⁴ Wesley Johnson, *Judges Will Ask European Court 'to Think Again'*, PRESS ASS'N NAT'L NEWSWIRE, July 29, 2010, available at Factiva, Doc. No. PRESSA0020100729e67t006mz.

²⁷⁵ See *Kaye v. Robertson*, [1991] F.S.R. 62, 66 ("It is well-known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy.") (Glidewell, L.J.).

²⁷⁶ *Id.*

²⁷⁷ In *Kaye v. Robertson*, [1991] F.S.R. 62, an actor, Gordon Kaye, was recovering in a hospital from severe head injuries sustained in a car accident. Despite notices of restricted access, two reporters from the tabloid newspaper *Sunday Sport* entered Kaye's hospital room, took photographs, and conducted an interview to which Kaye was medically incapable of giving informed consent. The court denied Kaye's claims for violation of privacy given the absence of any common law right to privacy in English law. *Id.* at 66, 70.

²⁷⁸ See *id.* at 66 ("The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals.") (Glidewell, L.J.); *id.* at 70 ("This case nonetheless highlights, yet again, the

Parliament enacted the Human Rights Act, which, following the terms of the Convention (Articles 10 and 8, respectively), protects both the freedom of expression (used to support a free press) and the right to respect for an individual's private and family life.²⁸⁰ Soon after the passage of the HRA, and drawing on European case law, courts began to balance these two rights in favor of privacy.²⁸¹

At the time of the enactment of the HRA, there was some concern about the possible implications the introduction of a right to privacy might have on the British press—and, in particular, the powerful tabloid press.²⁸² Members of the Blair government assured the press that the HRA was not a threat.²⁸³ It may be that Blair and others believed this to be true, but Lord Judge Leggatt had identified the tension very clearly back in 1991: “We do not need a First Amendment to preserve the freedom of the press, but the abuse of that freedom can be ensured only by the enforcement of a right to privacy.”²⁸⁴ And the media recognized that the introduction of the protections in the HRA could lead to privacy protections through the “back door,”²⁸⁵ without the benefit of an open debate in Parliament focused on the privacy issue.

It seems clear that parliamentarians were uninterested in having an open debate on the protection of privacy—and the concomitant limitations on the freedom of the press—perhaps because of the power of the press in the election cycles in Britain. As Mark Graber has argued in the American context, certain issues crosscut political parties; if neither party will achieve any electoral benefit by championing a position, it is to both parties' benefit to allow the issue to be decided by the courts. In Graber's model of judicial empowerment, the existence of a crosscutting issue indicates the possibility for delegation to the judiciary and eventual acquiescence in the judiciary's

failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens.” (Bingham, L.J.); *id.* at 71 (“This right [to privacy] has so long been disregarded here that it can be recognised now only by the legislature.”) (Leggatt, L.J.).

²⁷⁹ See *supra* Part II.A.

²⁸⁰ Human Rights Act, 1998, c. 42 (U.K.); Convention, *supra* note 66.

²⁸¹ See *Campbell v. MGN, Ltd.*, [2004] UKHL 22, [2004] 2 A.C. 457 [2]–[8], [125] (appeal taken from Eng.) (holding Mirror Group liable for publishing photographs of supermodel Naomi Campbell leaving a Narcotics Anonymous meeting, where publication constituted wrongful disclosure of private information in violation of Ms. Campbell's right of privacy under Article 8 of the Convention, and where Mirror Group's right to freedom of expression under Article 10 of the Convention did not outweigh Ms. Campbell's privacy interest).

²⁸² See Les P. Carnegie, Note, *Privacy and the Press: The Impact of Incorporating the European Convention on Human Rights in the United Kingdom*, 9 DUKE J. COMP. & INT'L L. 311, 338–40 (1998).

²⁸³ See Michael White, *No Back Door Privacy Laws, Pledges Blair*, GUARDIAN, Feb. 12, 1998, at 8; James Landale & Frances Gibb, *Rights Bill Is No Threat to Press, Irvine Insists*, TIMES (London), Nov. 4, 1997, at 8.

²⁸⁴ *Kaye v. Robertson*, [1991] F.S.R. 62, 71.

²⁸⁵ See White, *supra* note 283.

determinations.²⁸⁶ Privacy law itself may not be a crosscutting issue, but angering the powerful media companies may have been equally undesirable for both the Labor and Conservative parties. The evolution of privacy law in the United Kingdom since the Human Rights Act suggests that this may be an area that parliamentarians were happy to delegate to the courts. And, in important ways, Parliament has acquiesced in much of what the courts have done.

In 2010, British courts began to issue injunctions preventing the press from publishing details on the private lives of some of Britain's A-list celebrities, as potential violations of the individuals' Convention rights (justiciable through the HRA) to privacy. Some of these injunctions were "super" injunctions: not only did they prevent the press from publishing the dirt,²⁸⁷ they also forbade the publication of the fact of the injunction or the existence of the proceedings.²⁸⁸ Others were "anonymised": the existence of proceedings could be acknowledged, but the names of the parties were to be kept secret.²⁸⁹

These super-injunctions spurred a great deal of political controversy and backlash. Manchester United footballer Ryan Giggs was granted a super-injunction against the British tabloid, *The Sun*, and model Imogen Thomas, who had threatened to disclose an affair with Giggs.²⁹⁰ Many felt that privacy rights were going too far,²⁹¹ and in the Giggs case, an individual parliamentarian used parliamentary privilege to blow the whistle on the super-injunction.²⁹² The public—and the press—were outraged at the protections offered to Giggs.²⁹³

²⁸⁶ Graber, *The Nonmajoritarian Difficulty*, *supra* note 12, at 38.

²⁸⁷ Cf. Boris Johnson, *Leveson Report: Only a Gutter Press Can Keep Clean the Gutters of Public Life*, TELEGRAPH (Mar. 17, 2013, 10:15 PM), <http://www.telegraph.co.uk/news/uknews/leveson-inquiry/9936516/Leveson-report-Only-a-gutter-press-can-keep-clean-the-gutters-of-public-life.html> ("[I]f you want to keep clean the gutters of public life, you need a gutter press."). Johnson is the current Mayor of London. *Mayor of London*, GREATER LONDON AUTHORITY, <http://www.london.gov.uk/mayor-assembly/mayor> (last visited Mar. 23, 2014).

²⁸⁸ COMM. ON SUPER-INJUNCTIONS, REPORT OF THE COMMITTEE ON SUPER-INJUNCTIONS iv (2011) [hereinafter NEUBERGER REPORT], <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/super-injunction-report-20052011.pdf>.

²⁸⁹ *Id.*

²⁹⁰ See Martin Beckford, *Ryan Giggs Named in Court for First Time over Injunction*, TELEGRAPH (Feb. 22, 2012, 7:00 AM), <http://www.telegraph.co.uk/news/newstoppers/lawreports/9096152/Ryan-Giggs-named-in-court-for-first-time-over-injunction.html>; *Ryan Giggs: Timeline of Injunction Debate*, TELEGRAPH (Feb. 21, 2012, 2:21 PM), <http://www.telegraph.co.uk/news/uknews/law-and-order/9095887/Ryan-Giggs-timeline-of-injunction-debate.html>.

²⁹¹ Mary Riddell, *The Battle Between Parliament and the Judges Has Only Just Begun*, TELEGRAPH (May 30, 2011, 7:23 PM), <http://www.telegraph.co.uk/comment/columnists/maryriddell/8546514/The-battle-between-Parliament-and-the-judges-has-only-just-begun.html> ("Injunctions to protect footballers' privacy have exposed the law to ridicule . . .").

²⁹² 528 PARL. DEB., H.C. (6th ser.) (2011) 638 (U.K.) (John Hemming); Steve Doughty, *We Will Not Be Gagged, M'lud: As Ryan Giggs Is Named in Parliament as Cheating Star After Weeks of Legal Farce, MPs Launch a Defiant Message*, DAILY MAIL ONLINE (May 24, 2011, 7:06 AM), 592

Prime Minister David Cameron responded to the controversy, pinning the blame squarely on the judges:

What's happening here is that the judges are using the European convention on human rights to deliver a sort of privacy law without [P]arliament saying so. . . . [W]e do need to have a proper sit back and think: is this right, is this the right thing to happen? The judges are creating a sort of privacy law, whereas what ought to happen in a parliamentary democracy is parliament—which you elect and put there—should decide how much protection do we want for individuals and how much freedom of the press and the rest of it. . . . It might be odd to hear it, but I don't really have the answer to this one, I need to do some more thinking about it.²⁹⁴

One commentator expected a “battle” to emerge between Parliament and the judges.²⁹⁵ But Cameron did not advocate a quick legislative response by Parliament. Instead, a series of committees on privacy were convened.

Both the 2011 Committee on Super-Injunctions and the 2012 Joint Committee on Privacy and Injunctions ultimately supported the judges. The 2011 Committee, although discouraging their use, acknowledged that “super-injunctions and anonymised injunctions represent a new extension of established forms of anonymity, privacy and non-disclosure orders in that, they are used to protect substantive legal rights which have, in accordance with the HRA, developed beyond their previous historical limits.”²⁹⁶ And in debate in the House of Lords, Lord Black of Brentwood recognized that the courts were only doing their duty in interpreting the Human Rights Act.²⁹⁷ The 2012 Committee was created after it came to light that British newspapers were hacking the cell phones of celebrities to monitor their calls and voicemails. The Joint Committee on Privacy and Injunctions produced a report, concluding that a privacy statute would be unnecessary:

<http://www.dailymail.co.uk/news/article-1389841/Ryan-Giggs-named-Parliament-cheating-super-injunction-star.html>.

²⁹³ Owen Bowcott, *Privacy Law Should Be Made by MPs, Not Judges, Says David Cameron*, GUARDIAN (Apr. 21, 2011, 11:14 AM), <http://www.guardian.co.uk/media/2011/apr/21/cameron-super-injunctions-parliament-should-decide-law> (noting one description of press response as “[t]he newspapers have decided that the way to change policy is to shout about it from the rooftops”).

²⁹⁴ *Id.*

²⁹⁵ Riddell, *supra* note 291 (“Judges and politicians do not, and should not, always agree. The danger is that their differences, for which the catalyst is usually though not invariably human rights, become a power battle leading to constitutional meltdown.”).

²⁹⁶ NEUBERGER REPORT, *supra* note 288, at 23.

²⁹⁷ 727 PARL. DEB., H.L. (5th ser.) (2011) 1516 (U.K.) (Lord Black of Brentwood) (“It is not the courts that are responsible for the changing balance between privacy and freedom of expression; they are merely interpreting the law, which does not spring from some form of public policy either but from the Human Rights Act and the manner in which it incorporated the European convention into our domestic law.”).

It is important that privacy injunctions are obtained in circumstances which justify the intervention of the law; injunctions should not be too freely or easily obtainable. [But w]e conclude that a privacy statute would not clarify the law. The concepts of privacy and the public interest are not set in stone, and evolve over time. We conclude that the current approach, where judges balance the evidence and make a judgment on a case-by-case basis, provides the best mechanism for balancing article 8 and article 10 rights.²⁹⁸

The evolution of privacy law and the response of Parliament to the decisions of the judges suggest that parliamentarians have recognized the advantage of allowing judges to do some of the work in articulating and defining rights. Parliament appears willing to concede to the judges' version of privacy law, as it might be difficult to protect privacy in a manner consistent with the Convention while also placating the British press. As Lord Irvine said in debate in the House of Lords:

[T]he Government could introduce tomorrow a freedom of expression and privacy Bill compatibly with the convention if they took their courage in both hands. . . . [Given] the inevitable wrath of the tabloids . . . your Lordships should not be in the least surprised if no such legislation is ultimately brought forward. Far easier to go on berating the judges, however unfairly, for doing what Parliament has instructed them to do than to take the knock of legislation oneself.²⁹⁹

For now, Parliament has acquiesced in the judiciary's approach to privacy. But this type of relationship can shift from acquiescence to constraint. Parliament may find itself forced to accept other (less politically palatable) aspects of judicial decisionmaking in order to reinforce its position that the courts are best placed to address these types of questions. In this way, and over an uncertain length of time, judicial empowerment may grow to serve as a practical limitation on parliamentary sovereignty.

B. Pressures for Uniformity

Federalism creates variation.³⁰⁰ Multilevel governance systems, whether devolved or federal, are thought to encourage maximization of individuals' preferences, as people can relocate to the constituent unit (state, province, etc.) that best reflects their desired bundle of goods and services.³⁰¹ In addition, permitting decisions about societal goods to be

²⁹⁸ JOINT COMM. ON PRIVACY & INJUNCTIONS, PRIVACY AND INJUNCTIONS, 2010–12, H.L. 273, H.C. 1443, at 4; *see also id.* at 15–16.

²⁹⁹ 727 PARL. DEB., H.L. (5th ser.) (2011) 1494 (U.K.).

³⁰⁰ *See* DAVIS, *supra* note 191, at 122–23; DUCHACEK, *supra* note 191, at 255–58; HICKS, *supra* note 191, at 7; D.J. KRIEK ET AL., FEDERALISM: THE SOLUTION? 7–8 (1992); LIVINGSTON, *supra* note 191, at 10–11.

³⁰¹ *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 423 (1956) (“Policies that promote residential mobility and increase the knowledge of the consumer-voter will improve the allocation of government expenditures”); *see also* Himsworth, *supra* note 171, at 594

made as close as possible to the citizens affected allows for preferences and results to be better matched and can foster democratic involvement.³⁰² But variation is rarely allowed full rein: the constituent units must retain some type of commonality in order to maintain the integrity of the state as a whole.³⁰³ If certain goods vary too widely, the cohesiveness of the state is threatened by the challenge of what in Britain is called the “post-code lottery”: people may come to believe that rights or benefits are unequally distributed, or are randomly provided based only on location, rather than on substantive theory or reasoned decisionmaking.³⁰⁴ In order to relieve this political pressure, there are often certain areas of law—usually rights provisions—that are uniform across the system, imposed by the highest level legislature.

The Human Rights Act provides one of the few areas of nationwide law in the United Kingdom. Although not mentioned in the course of the law’s promulgation, “it must have been assumed, at least on the part of the UK government, that [the HRA] would maintain a broad uniformity of approach between the UK jurisdictions.”³⁰⁵ Variation is expressly discouraged: in the Scotland Act (1998), “certain ‘rights-related’ matters . . . are reserved [to Westminster],” and “the HRA itself may not be modified by the Scottish Parliament.”³⁰⁶

Beyond the unifying aspects of a sole internal rights regime, the HRA as uniform law has additional import in light of its connection to the Convention. The Convention is part of a system that has taken on elements of a quasi-federal regime,³⁰⁷ but it is nevertheless an international treaty,

40 (“[A] principal use of the division of the United Kingdom into ‘country’-based jurisdictions has been in the definition of the territorial scope of primary legislation.”).

³⁰² See Himsworth, *supra* note 171, at 31–32 (“Devolution has enhanced the capacity for difference and, more importantly, enhanced its democratic base.”).

³⁰³ LIVINGSTON, *supra* note 191, at 310.

³⁰⁴ Himsworth, *supra* note 171, at 32 (“[T]here may be particular questions raised at those points where policy divergence appears also to impinge on the ‘rights’ of the affected populations. It might be supposed that some such ‘rights’ should not be subject to the vagaries of devolution but should be enjoyed uniformly by all citizens across the state as a whole.”); *id.* at 48 (“[D]evolution has probably produced conditions in which . . . irrational or unexplained diversity of practice, especially if this affects the ‘rights’ of citizens, will prove to be less readily tolerated.”); *id.* at 58 (“[T]he asymmetries of access to ‘rights’ even though of quite long standing, may become more exposed to scrutiny. There may become a greater intolerance of ‘postcode law.’”).

³⁰⁵ *Id.* at 54.

³⁰⁶ *Id.* at 55 (emphasis omitted).

³⁰⁷ It is the individual who claims her rights to have been violated that brings the petition to the ECtHR. This connection between an individual and the ECtHR moves the Convention system away from classic international treaties or international law. As the ECtHR itself declared in 1978, “the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a ‘collective enforcement.’” *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 90, para. 239 (1978).

and it is the United Kingdom that ratified and is party to the treaty.³⁰⁸ Rights-based challenges to actions by *Scottish* entities result in petitions filed against the *United Kingdom* in Strasbourg. It is, therefore, in the interest of the British government and the Westminster Parliament to find an effective mechanism of ensuring uniformity at the national level, in advance of challenges at the ECtHR. The imposition of international obligations counsels in favor of having a domestic institution with the power to ensure subnational compliance.³⁰⁹

In light of these interests, what are the possibilities for divergent application or definition of rights, and which institution can best solve for the variation? In the evolution of judicial authority in the United States, the U.S. Supreme Court gained power during times in which it was the only national institution available to impose uniform rules.³¹⁰ Litigants petitioned the Court and attempted to strengthen its role and power in the constitutional system in order to benefit from its nationalizing tendencies.³¹¹ Is there an analogous opportunity for the U.K. Supreme Court?

In the United States, the American Supreme Court was able to provide nationalizing, uniform rulings when Congress was either unable or unwilling to use its legislative power to impose uniformity on the states.³¹² But in the United Kingdom, Westminster maintains its authority to enact legislation for Scotland. Furthermore, although the U.K. Supreme Court may be able to declare certain acts of the Scottish Parliament ultra vires if in violation of the HRA, it can only find similar legislation passed by Westminster “incompatible.”³¹³ Thus, divergent legislation on rights issues can be remedied only by Westminster itself.

There is, however, one area in which the Westminster Parliament is less able to enforce uniformity across the United Kingdom: criminal law. As a condition of the 1707 Act of Union, Scots law, and in particular, Scots criminal law, was to remain separate from English law.³¹⁴ Westminster can change Scots criminal law, and it has done so, most recently in the

³⁰⁸ See *supra* notes 65–66 and accompanying text.

³⁰⁹ This dynamic is also presented by the application of European Union law within Britain, and the Appellate Committee of the House of Lords has been alert to its role in promoting uniformity. See Himsworth, *supra* note 171, at 49 (footnote omitted) (“The goal of uniformity in the application of EC law does, of course, have specific consequences for the UK jurisdictions—a point recently noted in the *Abna* applications brought in all three jurisdictions to suspend Regulations pending the outcome of proceedings before the ECJ. In *Abna Ltd v. Scottish Ministers*, the view was expressed that it would be ‘extremely unsatisfactory if different situations existed in different parts of the United Kingdom.’”).

³¹⁰ See Friedman & Delaney, *supra* note 12, at 1154–59, 1172–76.

³¹¹ See *id.* at 1160–62 (discussing the role of national commercial interests in support of the U.S. Supreme Court).

³¹² See *id.* at 1168–72 (discussing the commerce power in the late 1800s).

³¹³ See *supra* Part II.A.

³¹⁴ See James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1655 & n.238 (2011).

Criminal Procedure (Scotland) Act 1995,³¹⁵ but it “has historically been extremely reluctant to interfere.”³¹⁶ In addition, and to protect the integrity of Scottish criminal law, the 1707 Act of Union did not give the Appellate Committee of the House of Lords jurisdiction to hear appeals from the High Court of Justiciary, the highest criminal court in Scotland.³¹⁷ Unsurprisingly, over time, the law of England and Wales has developed differently from that of Scotland in many areas, including the regulation of “police powers of arrest and detention.”³¹⁸

During the promulgation of the Scotland Act in 1998, the potential tension over Scots criminal law was not obvious. As noted above, “devolution issues” were expected to be challenges to the actions of the Scottish Parliament as outside the statutory division of competences provided in the Scotland Act. Yet almost immediately, creative litigants began collateral attacks on Scots criminal law by arguing that various actions of the Lord Advocate (Scotland’s attorney general) were in violation of Convention rights and therefore ultra vires. In 1999, the Privy Council was faced with an unanticipated and “extraordinarily” high number of these actions challenging prosecutorial decisions or collaterally attacking judicial decisions.³¹⁹ The Privy Council, however, was considered to be an acceptable entity to hear these challenges, as it had a longstanding role in monitoring the relationship between the United Kingdom and its Commonwealth countries.³²⁰ Its potential for creating *uniform* law on rights-related issues, however, was limited; the House of Lords remained the highest court for HRA questions presented by England and Wales.

During negotiations over the jurisdiction of the new Supreme Court, Scottish judges and politicians sought and received assurances that the historical isolation of Scots criminal law would be maintained.³²¹ Surprisingly, however, there was little focus on the decision to transfer the jurisdiction over devolution issues from the Privy Council to the Supreme Court. But the ability of the Supreme Court to hear these claims changed the nature of the relationship between the United Kingdom and Scots criminal law.³²² Two major cases demonstrated the new power of the

³¹⁵ Criminal Procedure (Scotland) Act, 1995, c. 46.

³¹⁶ Hazel Lewry, *The Conundrum of Scots Law*, NEWSNETSCOTLAND (July 8, 2011, 11:16 PM), <http://www.newsnetscotland.com/index.php/scottish-opinion/2639-the%20conundrum-of-scots-law.htm>.

³¹⁷ The prohibition on criminal appeals was confirmed in *Bywater v. Crown*, (1781) 2 Paton 563 (H.L.); see also Stuart Reid & Janice Edwards, *The Scottish Legal System*, 9 LEGAL INFO. MGMT. 9, 12 (2009) (discussing Criminal Appeal (Scotland) Act, 1926, 16 & 17 Geo. 5, c. 15).

³¹⁸ Himsforth, *supra* note 171, at 36.

³¹⁹ *Id.* at 56 & n.107.

³²⁰ See *supra* Part II.B.

³²¹ See *supra* notes 170–73 and accompanying text.

³²² Aidan O’Neill, *The End of the Independent Scottish Criminal Legal System? The Constitutional Significance of Allison and McInnes*, UKSC BLOG (Feb. 15, 2010), <http://ukseblog.com/the-end-of-the->

Supreme Court to insert itself into the previously separate Scottish domain in an effort to provide unifying rights interpretation.

In 2009, the High Court of Justiciary decided *HM Advocate v. McLean*,³²³ in which the defendant argued his interrogation without legal counsel violated Article 6 of the European Convention. In support of his claim, McLean relied on the ECtHR's 2008 decision in *Salduz v. Turkey*, finding "irretrievabl[e] prejudice[] when incriminating statements made during police interrogation without access to a lawyer are used for a conviction."³²⁴ But the Scottish court, based on considerable precedent, concluded that there was no such violation, because "[i]n its opinion the guarantees otherwise available under the Scottish system were sufficient to avoid the risk of any unfairness."³²⁵ McLean also argued that the Scottish prosecutor's reliance on admissions made without access to legal advice raised a devolution issue, as the Scotland Act (1998) provided that acts in violation of the Convention could be found ultra vires. The High Court of Justiciary did not address devolution and denied leave to present the devolution issue before the Supreme Court; nevertheless the Supreme Court granted permission to appeal.³²⁶

Unlike its approach in *Horncastle*, the Supreme Court did not attempt to justify the Scottish system in light of Scottish history and interests.³²⁷ Lord Hope rejected the idea that the

question whether or not a detainee who was interrogated without access to a lawyer has had a fair trial will depend on the arrangements the particular jurisdiction has made, including any guarantees otherwise in place there. Distinctions of that kind would be entirely out of keeping with the Strasbourg court's approach to problems posed by the Convention, which is to provide

independent-scottish-criminal-legal-system-the-constitutional-significance-of-allison-and-mcinnis ("How has the independence, the splendid isolation/crabbed insularity (depending on one's perspective) of the Scottish criminal justice system been brought to an end, some three hundred years into the Union in which there had simply been no possibility of any criminal appeals from Scotland to London?").

³²³ [2009] HCJAC 97.

³²⁴ *Salduz v. Turkey*, 2008-V Eur. Ct. H.R. 59, paras. 55–56; see also *Cadder v. HM Advocate*, [2010] UKSC 43, [2010] 1 WLR 2601 [3] (describing holding in *Salduz* as finding a violation of Article 6 "because the applicant did not have the benefit of legal assistance while he was in police custody").

³²⁵ *Cadder*, [2010] UKSC at [3].

³²⁶ *Id.* at [11]–[12].

³²⁷ There was space in the doctrine to make such an argument. See Mads Andenas & Eirik Bjorge, *The External Effects of National ECHR Judgments* 27 (The Jean Monnet Program, Working Paper No. 07/12, 2012), available at www.JeanMonnetProgram.org ("On balance, therefore, it would have been conceivable—as conceivable as it was in *Horncastle*—to say in *Cadder* that the Strasbourg jurisprudence fell somewhat short of being 'clear and constant,' and at all events that the Court had—as it had in *Horncastle*—'concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process.'" (quoting *R v. Horncastle*, [2009] UKSC 14, [2010] 2 A.C. 373 [11])).

principled solutions that are universally applicable in all the contracting states.³²⁸

There was not to be “one rule for the countries in Eastern Europe such as Turkey on the one hand and those on its western fringes such as Scotland on the other.”³²⁹ In light of *Horncastle*, this analysis seems unusual. Lord Hope rested his analysis on the (presumed) clarity of the European jurisprudence and the (arguable) necessity of European-wide uniformity,³³⁰ but, and perhaps critically, he noted that Scotland was an outlier within the United Kingdom on this issue. Access to legal advice is provided in the law in England, Wales, and Northern Ireland.³³¹

The response of the media was overwhelmingly positive, noting the benefits to Scottish defendants³³² and the new uniformity with protections under English law.³³³ In addition, the Scottish Executive clearly anticipated the result, as the day following the judgment, the Scottish Parliament passed emergency legislation to address the issue, in the form of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act, 2010.³³⁴ At the same time, Lord Carloway, a senior Scottish judge, was asked to conduct a thorough review of Scots law and practice. His report was published over a year later, on November 17, 2011, and recommended making substantive changes to criminal procedure while maintaining a “distinctly Scottish criminal justice system for the future.”³³⁵

³²⁸ *Cadder*, [2010] UKSC at [40].

³²⁹ *Id.*

³³⁰ See Andenas & Bjorge, *supra* note 327, at 27.

³³¹ *Cadder*, [2010] UKSC at [49] (“[Scotland] would not be able to find support for [its] position from England and Wales or Northern Ireland. Access to legal advice was described in *R v Samuel* [1988] QB 615 as a fundamental right, and section 58(l) of the Police and Criminal Evidence Act 1984 provides that a person arrested and held in custody in a police station or other premises shall be entitled, if he so requires, to consult a solicitor privately at any time: see also section 59(l) of the Police and Criminal Evidence (Northern Ireland) Order 1989 (SI 1989/1341).”).

³³² See Carl Gardner, *UK Supreme Court Judgment: Cadder v H.M. Advocate*, HEAD OF LEGAL BLOG (Oct. 26, 2010), <http://headoflegal.com/2010/10/26/cadder-v-h-m-advocate> (describing the *Cadder* case as “one of the shining examples of the benefits of the Human Rights Act”); see also Severin Carrell, *Alex Salmond Provokes Fury with Attack on UK Supreme Court*, GUARDIAN (June 1, 2011, 1:28 PM), <http://www.guardian.co.uk/uk/2011/jun/01/alex-salmond-scotland-supreme-court> (noting that “[n]early 3,500 convictions were affected”).

³³³ Joshua Rozenberg, *Supreme Court: Where There Is Discord*, GUARDIAN (July 25, 2012, 7:43 AM), <http://www.guardian.co.uk/law/2012/jul/25/supreme-court-phillips-neuberger> (complimenting the Court on spurring the creation of “safeguards that had been available in England for more than 25 years”).

³³⁴ (A.S.P. 15).

³³⁵ Press Release, Scottish Gov’t, Creating a Fair Justice System for the 21st Century (Nov. 17, 2011), available at <http://www.scotland.gov.uk/About/Review/CarlowayReview/Newsrelease>; see SCOTTISH GOV’T, REFORMING SCOTS CRIMINAL LAW AND PRACTICE: THE CARLOWAY REPORT (2012), <http://www.scotland.gov.uk/Resource/0039/00396483.pdf>. For a substantive discussion of the recommendations of the Carloway Report, see James Chalmers & Fiona Leverick, ‘Substantial and Radical Change’: *A New Dawn for Scottish Criminal Procedure?*, 75 M.L.R. 837 (2012).

Notwithstanding the evidence suggesting Scotland was aware of and prepared to remedy its outlier status, Scottish Justice Secretary Kenny MacAskill and Lord Advocate Elish Angiolini chafed at the Supreme Court's directives. MacAskill grudgingly accepted the result:

The decision overturns decades of criminal procedure in Scotland, a proud, distinctive, justice system, developed over centuries, and predicated on fairness with many rigorous protections for accused persons. . . . Today's judgment in the Supreme Court has gone against the unanimous decision last October by seven Scottish High Court judges at the Scottish Appeal Court We are concerned that the current devolution arrangements have created an anomaly that seems to put Scottish law at a disadvantage in comparison to elsewhere in the EU. I want to see steps taken to address this anomaly.³³⁶

Angiolini shared MacAskill's concerns, worrying that "because of the approach of the Supreme Court," the future held not only harmonization but "a complete loss of identity for Scots law."³³⁷

The aftermath of *Cadder* was a positive development for criminal defendants in Scotland, and the Supreme Court was seen as an outlet for rights protection: attacks on the Scottish criminal justice system only increased in the few years after the Supreme Court was incorporated, reinforcing litigation, rather than legislation, as the possible solution to divergent rules.³³⁸ In 2011, the Court heard another high-profile case from Scotland that again raised questions about Scottish criminal justice.

Before the High Court of Justiciary, Nat Fraser appealed his conviction for the murder of his wife on the ground that the prosecution had failed to disclose evidence favorable to his case. He also raised a devolution issue, arguing that the prosecution's failure violated his rights under Article 6 of the Convention.³³⁹ The Scottish court refused his appeal and denied his application to appeal to the Supreme Court, concluding that the Westminster Parliament had not intended a right to appeal on criminal matters when it enacted the Scotland Act (1998).³⁴⁰

The Supreme Court granted Fraser's application for special leave to appeal. Lord Hope concluded that the Appeal Court had failed properly to entertain the argument that Fraser's Article 6 Convention rights were

³³⁶ *Justice Secretary Responds to the Supreme Court Decision*, STV NEWS (Oct. 26, 2010, 11:08 AM), <http://news.stv.tv/politics/204963-justice-secretary-responds-to-the-supreme-court-decision>.

³³⁷ *Lord Advocate Elish Angiolini on Legal Identity 'Loss'*, BBC NEWS (Feb. 8, 2011, 1:31 PM), <http://www.bbc.co.uk/news/uk-scotland-12399287>.

³³⁸ Cf. DAVID C. NICE, FEDERALISM: THE POLITICS OF INTERGOVERNMENTAL RELATIONS 23 (1987) ("[C]ontestants in intergovernmental politics seek the scope of conflict and decision-making arena most likely to produce the desired policy decision.").

³³⁹ *Fraser v. HM Advocate (Scotland)*, [2011] UKSC 24, [1]–[3], [10].

³⁴⁰ See *Fraser v. HM Advocate*, [2009] HCJAC 27.

violated.³⁴¹ The Supreme Court held that there was miscarriage of justice at Fraser's trial and that the appeal must be allowed. The Court itself did not quash the conviction, but remanded to a differently constituted Scottish appeal court to determine the possibility of retrial and, after having considered that question, to quash the conviction.³⁴²

The political response to the decision was deafening.³⁴³ Scotland's First Minister, Alex Salmond, lambasted the Supreme Court as treading on the independence of the Scottish legal system, referring to the Court as a "foreign" court.³⁴⁴ Justice Secretary Kenny MacAskill threatened to withhold the Scottish contribution to the Court's operating fund.³⁴⁵ And Lord Hope felt the need to respond by giving an interview to *The Times* defending the decision.³⁴⁶ After the initial heated exchanges, a compromise position was achieved: Salmond appointed a committee learned in Scots law to review the issue.³⁴⁷

This "Review Group" issued its final report in September 2011, and the results reaffirmed the importance of the Supreme Court in this area. The Group concluded that there was "some justification for allowing an appeal to the Supreme Court on the new matter of compliance with the Convention rights specified in the Human Rights Act 1998," a justification driven in large part by the need "to ensure that Convention rights are defined and understood by courts in the same way throughout the United Kingdom."³⁴⁸ It further accepted

that the nature of the British constitution, and the separate position of Scots law in general (and Scots criminal law in particular) means that some asymmetries are unavoidable. . . . It is important to reduce these asymmetries . . . when they are unintended or lack any justification in terms of historical distinctiveness or current rationale.³⁴⁹

³⁴¹ *Fraser*, [2011] UKSC at [12], [14].

³⁴² *Id.* at [43].

³⁴³ Carrell, *supra* note 332 ("The row has split the Scottish judiciary and legal profession. Many senior judges, supported by the former lord advocate Elish Angiolini, have openly challenged the supreme court's authority to overrule them.").

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ Magnus Linklater & Lindsay McIntosh, *Salmond Has Got It All Wrong, Says Judge*, THE TIMES (London) (May 27, 2011, 12:01 AM), <http://www.thetimes.co.uk/to/news/uk/scotland/article3041468.ece>.

³⁴⁷ Salmond appointed Lord McCluskey, Sir Gerald Gordon, Sheriff Charles Stoddart, and Professor Neil Walker. Press Release, Scottish Gov't, UK Supreme Court (May 6, 2011), *available at* <http://www.scotland.gov.uk/News/Releases/2011/06/04200343>.

³⁴⁸ LORD MCCLUSKEY, SIR GERALD GORDON, SHERIFF CHARLES STODDART & PROFESSOR NEIL WALKER, FINAL REPORT OF REVIEW GROUP: EXAMINATION OF THE RELATIONSHIP BETWEEN THE HIGH COURT OF JUSTICIARY AND THE SUPREME COURT IN CRIMINAL CASES para. 10 (2011).

³⁴⁹ *Id.* para. 40.

The Group did seek to equalize the process by which appeals were sought by replicating the procedures in England, Wales, and Northern Ireland, all of which require the lower court to certify that the case raises a point of law of general public importance.³⁵⁰ Criminal cases would no longer be truly insulated from centralized review.

Notwithstanding the report from the experts and the general willingness of much of the legal profession to accept the Court's determinations, the aftermath of the *Fraser* case demonstrated the limits of the Supreme Court's abilities. Scottish nationalists remained agitated by the intrusion into Scots law.³⁵¹ Scottish First Minister Alex Salmond began to work directly with Prime Minister Cameron to arrange a nonbinding referendum on Scottish independence and further sought to influence the proposed 2012 amendments to the original Scotland Act of 1998, restructuring some of the devolutionary settlement.³⁵² The existence of political channels to allow for the negotiation of asymmetrical aspects of the relationship between Scotland and the United Kingdom provides a means to work around the Court. *Fraser's* aftermath also suggests that Scottish independence isn't the type of crosscutting issue that will lead to parliamentary delegation to the Court. Thus far, the parties (the governments in Westminster and Holyrood, as well as Conservative, Labour, Liberal, and Scottish Democratic political parties) have sought to reach negotiated settlements, rather than leave the contentious issues to litigation.

Nonetheless, even in light of pressure from Scotland, if the Court maintains an institutional advantage in harmonizing rights across the various subnational entities that make up the U.K., the Westminster Parliament could be expected to protect the Court and its unique unifying role, and even to enhance the Court's power.³⁵³ The results in the Scotland Act (2012) provide marginal support for this theory. The proposed Scotland Bill was drafted in response to a report by the Calman Committee³⁵⁴—a group convened by motion in the Scottish Parliament in 2007 with a remit to review the provisions of the 1998 Act “in the light of experience” and to

³⁵⁰ *Id.* at 1 (Executive Summary).

³⁵¹ Severin Carrell, *UK Supreme Court's Jurisdiction in Scotland Upheld by Review Panel*, *GUARDIAN* (Sept. 14, 2011, 2:48 PM), <http://www.guardian.co.uk/law/2011/sep/14/supreme-court-scotland-jurisdiction-upheld> (citing MacAskill as saying that “[s]ome of the finest legal and constitutional minds in the country have recognised that the UK supreme court plays a much more significant—and inappropriate—role in Scottish criminal law than had been envisaged when the Scotland Act was passed, and that it is more intrusive within Scots law than is the case for the other jurisdictions within the UK”).

³⁵² *See supra* note 131 and accompanying text.

³⁵³ *Cf.* Friedman & Delaney, *supra* note 12, at 1149–59 (describing the manner in which the U.S. Supreme Court achieved vertical supremacy in the United States).

³⁵⁴ *See Commission Members*, COMMISSION ON SCOTTISH DEVOLUTION, <http://www.commissiononscottishdevolution.org.uk/about/members.php> (last visited Mar. 23, 2014).

recommend changes.³⁵⁵ The Calman Committee's Final Report made a number of recommendations, including, perhaps most importantly, expanding Scotland's taxing and borrowing powers.³⁵⁶ The Report was issued in June 2009, before the Supreme Court opened for business in October of that year. It did not address the tensions over criminal appeals.³⁵⁷

As initially proposed in the Westminster Parliament, the Scotland Act (2012) did not alter the provisions in the 1998 Act that referred to criminal law or the actions of Scotland's top prosecutor.³⁵⁸ But, due to the Sewel Convention, which provides the Scottish Parliament opportunity to discuss and consent to Westminster's proposed alterations to Scottish powers,³⁵⁹ the Bill spent a considerable amount of time in committee at Holyrood after its introduction. The Scotland Bill Committee of the Scottish Parliament raised the issue of "Convention rights, the Scotland Act, and Scots criminal law,"³⁶⁰ and through an informal consultation procedure initiated by the Advocate General,³⁶¹ pressure was brought to bear on the U.K. government to introduce an amendment to limit the Supreme Court's ability to hear and remedy criminal cases arising from Scotland.³⁶²

The *Fraser* case was handed down as the Bill went to its third reading in the House of Commons.³⁶³ In Westminster, parliamentarians were torn.

³⁵⁵ See *Frequently Asked Questions*, COMMISSION ON SCOTTISH DEVOLUTION, <http://www.commissiononscottishdevolution.org.uk/about/faqs.php> (last visited Mar. 23, 2014).

³⁵⁶ COMM'N ON SCOTTISH DEVOLUTION, *SERVING SCOTLAND BETTER: SCOTLAND AND THE UNITED KINGDOM IN THE 21ST CENTURY* para. 3.206 (2009).

³⁵⁷ *Id.* para. 5.37 (2009) ("The Commission acknowledges the importance of this issue, and considers . . . that it is an issue that deserves urgent reconsideration. It has, however, come to the conclusion that it raises wider questions that do not come within its remit. The underlying question is whether, and if so to what extent, Scottish criminal law and procedure should in future be subject to review by the Supreme Court of the United Kingdom.").

³⁵⁸ See 519 PARL. DEB., H.C. (6th ser.) (2010) 689 (U.K.).

³⁵⁹ See *supra* notes 207–08 and accompanying text.

³⁶⁰ *Material Provided by the Scottish Government to the Scotland Bill Committee*, SCOTTISH GOV'T, <http://www.scotland.gov.uk/Publications/2011/03/Briefing-Scotland-bill> (last visited Mar. 23, 2014); see also SCOTLAND BILL COMM., *REPORT ON THE SCOTLAND BILL AND RELEVANT LEGISLATIVE CONSENT MEMORANDA* paras. 916–73 (2011), available at <http://archive.scottish.parliament.uk/s3/committees/scotBill/reports-11/sbr11-01-1.htm#79>.

³⁶¹ The Advocate General, a member of the Prime Minister's Cabinet, advises the U.K. government on Scots law. *Ministerial Role: HM Advocate General for Scotland*, GOV.UK, <https://www.gov.uk/government/ministers/hm-advocate-general-for-scotland> (last visited Mar. 23, 2014). The position was created in the Scotland Act (1998) as part of the restructuring of the Scottish Office due to devolution. See Scotland Act, 1998, c. 46, para. 87.

³⁶² For a discussion of the proposed amendments and the Scottish response, see Aidan O'Neill, *The Englishing of Scots Criminal Law?—The Advocate-General's Proposals for the Appeals to the Supreme Court in Criminal Cases from Scotland*, UKSC BLOG (Mar. 17, 2011), <http://ukscblog.com/devolution-issues-and-acts-of-the-lord-advocate-consultation-on-clauses-to-amend-the-scotland-act>.

³⁶³ *Fraser v. HM Advocate (Scotland)*, [2011] UKSC 24; *Bill Stages—Scotland Act 2012*, U.K. PARLIAMENT, <http://services.parliament.uk/bills/2010-12/scotland/stages.html> (last visited Mar. 23, 2014).

Ann McKechnin, a Labor Member of Parliament, described the Supreme Court in glowing terms. She noted, “[N]o one living in Scotland should have less access to the enforcement of their human rights than any other citizen living elsewhere in the UK.”³⁶⁴ She also expressed frustration at statements from Salmond and MacAskill, who had argued that the U.K. Supreme Court should have no jurisdiction in Scottish criminal cases.³⁶⁵ Ultimately, an amendment passed and was incorporated into the Scotland Bill (2012), limiting the power of the Court to review certain acts of the Lord Advocate as ultra vires for devolution purposes.³⁶⁶ However, stronger limits on the Court were not introduced; it retains the jurisdiction to hear devolution—now called “compatibility”—issues raised in the context of a criminal case.³⁶⁷ It is, however, limited in its ability to create remedies and must return the case to the High Court of Justiciary for final disposition.³⁶⁸

The relationships among the Supreme Court, the Human Rights Act, and Scotland are far from settled. The new compatibility provisions came into force in April 2013,³⁶⁹ and it may be some time before the next *Fraser* makes its way to the Supreme Court.³⁷⁰ Some lawyers and politicians appear to believe that the Court plays an important role in unifying the rights regime across the United Kingdom and in keeping outlier Scotland in line. Even under pressure from Scottish interests and in the face of a threatened referendum on independence, the Westminster Parliament maintained some role for the Court, perhaps acknowledging the Court’s unique role in maintaining equal rights for all British citizens.

CONCLUSION

Building on the theoretical insights from literature on judicial empowerment and federalism, this Article has identified elements within

³⁶⁴ 530 PARL. DEB., H.C. (6th ser.) (2011) 286 (U.K.). The Bill as introduced in 2010 is available at *Bill Documents—Scotland Act 2012*, U.K. PARLIAMENT, <http://services.parliament.uk/bills/2010-12/scotland/documents.html> (last visited Mar. 23, 2014).

³⁶⁵ 530 PARL. DEB., H.C. (6th ser.) (2011) 286–87 (U.K.).

³⁶⁶ Sections 34, 35, and 36 of the enacted Scotland Act (2012) were not in the original Act as proposed in the House of Commons. See Scotland Bill, 2010–11, H.C. Bill [115], available at <http://services.parliament.uk/bills/2010-12/scotland/documents.html>.

³⁶⁷ Scotland Act, 2012, c. 11, §§ 34, 35, 36; SUPREME COURT OF THE U.K., THE JURISDICTION OF THE SUPREME COURT OF THE UNITED KINGDOM IN SCOTTISH APPEALS: HUMAN RIGHTS AND THE SCOTLAND ACT 2012 (2013), available at <http://www.supremecourt.gov.uk/about/role-of-the-supreme-court.html>.

³⁶⁸ Scotland Act, 2012, c. 11, §§ 35, 36; SUPREME COURT OF THE U.K., THE JURISDICTION, *supra* note 367.

³⁶⁹ See Scotland Act, 2012, c. 11, § 44 (effective date of the Act); The Scotland Act 2012 (Commencement No. 3) Order 2013, 2013, S.I. 2013/6 (U.K.).

³⁷⁰ As of December 2013, the Court has yet to rule on an issue brought to it under the new procedures. See *Decided Cases*, SUP. CT., <http://supremecourt.uk/decided-cases/index.shtml> (last visited Mar. 23, 2014) (listing no case between April 22, 2013, and December 18, 2013, addressing Scots criminal law or application of such law in the context of a compatibility issue).

the British system that may, in time, serve to support the increased power of the British judiciary and the U.K. Supreme Court in particular. The connection between multilevel governance structures and rights protection demonstrates repeated opportunities for the Court to accrue power, based on the interests of parliamentarians and politicians at both the central and subnational levels of the country. The Court is uniquely placed to monitor crucial boundaries at the subnational and international levels as well as to provide uniformity across the national level, particularly regarding rights protection.

The U.K. Supreme Court is poised to become more powerful. Whether a rising judiciary will truly undermine parliamentary sovereignty remains to be seen, but scholars and politicians should pay attention to the groundwork being laid. The relationships and evolving dynamics outlined here serve as some support for those who suggest that constitutional reform is moving the U.K. in a legal constitutionalist direction. Of course, the institutional growth of courts is not a perfect proxy for external limitations on parliament. In addition, and perhaps more importantly, parliamentary sovereignty retains a powerful conceptual hold on judges, politicians, and academics. Thus, some will continue to rationalize, harmonize, and reconcile a rising judiciary with some version of parliamentary sovereignty, though these efforts may be possible only through formalism or, ultimately, fiat.

Copyright of Northwestern University Law Review is the property of Northwestern University School of Law and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.